93-428

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

SEABOURN S. LIVINGSTONE,
Petitioner,

v.

RICHARD M. DONAHEY and PATRICIA A. DONAHEY,
Plaintiff/Respondents,

and

HELEN L. BOGLE,
Third Party Plaintiff/Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I.

MAY A PRIVATE PARTY, WHO BRINGS A CONTRIBUTION ACTION TO RECOVER COSTS OF RESPONDING TO ENVIRONMENTAL CONTAMINATION UNDER SECTIONS 107(a) AND 113(f)(1) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, AS AMENDED ("CERCLA"), 42 U.S.C. §§ 9607(a) AND 9613(f)(1), RECOVER LITIGATION COSTS AND ATTORNEYS' FEES AS PART OF ITS RESPONSE COSTS?

II.

MAY A CORPORATE SHAREHOLDER, WHO DID NOT PARTICIPATE IN, MANAGE OR CONTROL THE DAY TO DAY OPERATIONS OF THE CORPORATION (INCLUDING ITS WASTE DISPOSAL OPERATIONS), BE HELD LIABLE UNDER SECTION 107(a) OF CERCLA, 42 U.S.C. 9607(a), AS AN "OWNER" OR "OPERATOR" OF A FACILITY LEASED TO THE CORPORATION?

PARTIES BELOW

The parties to the proceedings below are identified in the caption of the case. Additional parties below include defendants St. Clair Rubber Company and H. Gordon Wood, an individual, neither of whom has joined in this petition to the Court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported as *Donahey* v. *Bogle*, 987 F.2d 1250 (6th Cir. 1993). A copy of the opinion is included in the Appendix at A-1. The court of appeals' order, denying petitioner Livingstone's petition for rehearing with suggestion for rehearing en banc, is included in the Appendix at A-13. The court of appeals' judgment is included at A-12. A copy of the trial court's memorandum opinion and order is included at A-14.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and 28 U.S.C. 1651:

> "**§ 1254. Courts of appeals; certiorari; appeal; certified questions**
>
> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree; . . ."

"**§ 1651. Writs**

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

The court of appeals' Order was issued on March 9, 1993. That court denied a timely petition for rehearing with suggestion for rehearing en banc on June 15, 1993, A-13, and the mandate thereto issued on June 25, 1993, A-12.

STATUTES INVOLVED

The pertinent sections of CERCLA involved in this appeal are § 101, 42 U.S.C. 9601; § 107(a), 42 U.S.C. 9607(a); and § 113(f), 42 U.S.C. 9613(f). Their texts are set forth verbatim in the appendix at A-58–A-62.

CONCISE STATEMENT OF THE CASE

This case presents questions of (1) the appropriate standard for imposing liability under CERCLA on a shareholder of a corporation, and (2) whether a private litigant, who is a liable party under CERCLA, may recover attorneys' fees it incurs in bringing a contribution action against other *potentially* liable parties to recover

part of its response costs under CERCLA. CERCLA itself is silent as to these questions, and its silence has resulted in the proliferation of conflicting decisions at all levels of the federal courts.

Only the Fourth and Sixth Circuits have decided that mere ownership of corporate stock can serve as the basis for liability under CERCLA. This has created a conflict among the courts of appeals on this crucial issue. The First, Second, Fifth, Eighth and Eleventh Circuits would require direct involvement of an officer, director or shareholder in the corporation's waste management activities, regardless of the number of shares owned, before liability would be imposed.

The Sixth and Eighth Circuits would award attorneys' fees to a private litigant seeking to recover response costs under CERCLA. In contrast, the First, Ninth and Tenth Circuits have followed this Court's rulings that attorneys' fees are not recoverable unless specifically authorized by the governing statute and therefore have denied attorneys' fees to private litigants under CERCLA. Again, a conflict now exists among the courts of appeals on a significant issue under CERCLA, which this Court should resolve.

I.

THE TRIAL COURT DECISION

In this action, plaintiffs/respondents Richard and Patricia Donahey brought, *inter alia*, a contribution action to recover costs they allegedly incurred in responding to contamination on property they had purchased from Helen Bogle. They sought these response costs from Helen Bogle and, as well, from petitioner Seabourn S. Livingstone, the sole shareholder and a former director of the St. Clair Rubber Company, whose operations were alleged to have caused the contamina-

tion. The Donaheys argued that Livingstone, individually, was the "owner or operator" of the facility, and should therefore be held liable under 42 U.S.C. 9607 (a)(2). The costs the Donaheys sought to recover included $53,000 spent "cleaning up" the site, and over $279,000 in attorneys' fees incurred primarily in litigating their action under CERCLA.

CERCLA does not establish a standard for determining the liability of a corporate shareholder, director or officer. *Riverside Market Dev. Corp.* v. *Int'l Bldg. Products, Inc.*, 931 F.2d 327, 330 (5th Cir. 1991), *cert. denied, Riverside Market Ltd. Partner* v. *Prescott*, ___ U.S. ___, 112 S.Ct. 636, 116 L.Ed.2d 684 (1991). However, in deciding whether an officer, director or shareholder of a corporation may be held liable equally with the corporation as an "owner or operator" of a facility, the trial court, Judge Zatkoff of the Eastern District of Michigan, relied on *New York* v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) and *U.S.* v. *Conservation Chemical Co.*, 628 F.Supp. 391 (W.D.Mo. 1985), and stated:

> "A stockholder, director, or officer may be personally liable under § 9607(a)(2) of CERCLA in situations where it is shown that the individual *personally participated* in the wrongful conduct of the corporation." Judge Zatkoff's Memorandum Opinion and Order, October 1, 1991, p. 28. A-39.

Following a full trial, Judge Zatkoff weighed all of the testimony and other evidence, and specifically found that Livingstone participated *only* in the *financial aspects* of St. Clair Rubber Company. Day to day operations of the business were delegated to managers and supervisors who did not need (nor ever obtain) Livingstone's approval to execute their tasks. As the court found, there was no credible evidence (a) that Livingstone personally participated in or directed the waste

disposal practices of St. Clair Rubber, or (b) that he personally arranged for the disposal of its waste products. *Id.*, at 28-29, A-39-A-40. The court ruled that Livingstone was not liable as an "owner or operator" [under 42 U.S.C. 9607(a)(1) or (2)] or as one who arranged for the disposal of St. Clair's hazardous substances [under 42 U.S.C. 9607(a)(3)].

> "In this case, there is no credible evidence that Livingstone personally participated in the waste disposal practices of St. Clair. No witness testified that Livingstone gave explicit or implicit instructions to dispose of wastes in a specific manner. The testimony at trial clearly indicated that Livingstone personally participated in only the financial aspects of St. Clair's operations, and that the day to day affairs, including waste disposal practices, were handled by managers and supervisors who did not need approval from Livingstone to execute their duties. While it is true that Livingstone had the authority to control waste disposal practices, he never exercised such authority; it was delegated to others. Livingstone is not liable under § 9607(a)(2).
>
> "There is also no evidence that Livingstone personally arranged for the disposal of St. Clair's industrial waste products. Former St. Clair employees Nuss and Aldrich provided uncontroverted testimony that their participation as employees in St. Clair's waste disposal practices on the property was not under the direction of Livingstone. Both former employees testified that managers and supervisors directed their activities and that they had no reason to believe that Livingstone was involved at all. Thus, Livingstone is not liable under sec 9607(a)(3) as a

person who arranged for the treatment or disposal of St. Clair's waste materials." Judge Zatkoff's Memorandum Opinion and Order, October 1, 1991, pp 28-29, A-39–A-40. Footnote omitted.

The trial court also ruled that attorneys' fees incurred in a private party's contribution action for response costs were not recoverable as response costs. In reaching this conclusion, the court relied on the "American Rule", which provides that in the absence of explicit congressional authorization attorneys' fees are not recoverable costs, combined with the lack of any statutory provision in CERCLA authorizing such recovery. Memorandum Opinion and Order, October 1, 1990, p. 36, A-48. *See*, *Runyan* v. *McCrary*, 427 U.S. 160, 185, 96 S.Ct. 2586, 2602 (1976); *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612 (1975).

II.

THE APPELLATE COURT DECISION

Richard Donahey appealed the trial court's decision to the court of appeals for the Sixth Circuit. On March 9, 1993, the panel assigned to this action issued its opinion reversing the trial court on both of the above issues.

With regard to whether Livingstone personally was liable as an owner or operator of the facility, the court merely states that "Seabourn Livingstone [was] the sole stockholder of all the stock of St. Clair Rubber Company." *Id.*, 987 F.2d at 1252, A-2. The Court also noted the district court's finding that Livingstone did not participate in the company's day to day activities and that Livingstone was unaware of the contamination the Company had created. *Id.* 987 F.2d at 1254, A-7.

The Sixth Circuit used that lone fact (sole ownership of stock) as a sufficient basis to hold Livingstone liable personally, merely because he thereby had the same authority as any other majority shareholder in a corporation, the ultimate power to exert his influence:

> "* * * However, the [trial] court erred in concluding that Seabourne Livingstone was not liable as an *owner* under CERCLA. The evidence clearly established that *Livingstone had the authority* to prevent the contamination of the property by *his* corporation; thus, as a matter of law, Livingstone was a responsible party. *Kelley* v. *Thomas Solvent Co.*, 727 F.Supp. 1532 (W.D. Mich. 1989); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1043 (2d Cir. 1985); *U.S.* v. *Ward*, 618 F.Supp. 884 (E.D.N.C. 1985); and *U.S.* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986)."

Donahey v. *Bogle*, 987 F.2d 1250, 1254 (6th Cir. 1993), (emphasis supplied), A-7.

Beyond the statement cited above, the court of appeals did not analyze or discuss the appropriate standard for holding a corporate shareholder liable under CERCLA. The opinion included no other discussion of or findings of fact related to Livingstone's liability. None of Judge Zatkoff's factual findings were modified or reversed in the court's opinion.

The court of appeals also reversed the trial court's finding that attorneys' fees were not recoverable in a private CERCLA action. While it acknowledged the trial court's reasoning, the court of appeals ignored this Court's teachings and the contrary authority of the First, Ninth and Tenth Circuits. Instead, the court followed the reasoning of *Bolin* v. *Cessna Aircraft Co.*, 759 F.

Supp. 692 (D. Kan. 1991), *Shapiro* v. *Alexanderson*, 741 F. Supp. 472 (S.D.N.Y. 1990), and *General Electric* Co. v. *Litton Industrial Automation Systems*, 920 F.2d 1415 (8th Cir. 1990), *cert. den.*, ___ U.S. ___, 111 S. Ct. 1390, 113 L.Ed.2d 446 (1991). In particular, the court found persuasive the *Bolin* court's reasoning: that requiring private parties to bear the financial burden of their cost recovery suits would defeat CERCLA's purpose of providing a powerful incentive for parties to expend their own funds without waiting for the responsible persons to take action. *Donahey* v. *Bogle*, 987 F.2d at 1256, A-10–A-11. The court of appeals reversed the trial court's denial of attorneys' fees, and remanded for determination of what constituted reasonable attorneys' fees recoverable under CERCLA in relation to plaintiffs' degree of success in the litigation. *Id.*

The Donaheys, Bogle and Livingstone filed timely petitions for rehearing with suggestion for rehearing en banc, which were denied. The court of appeals' judgment, filed on March 9, 1993, was issued as mandate on June 25, 1993.

This petition for writ of certiorari followed.

ARGUMENT FOR GRANTING THE WRIT

The Sixth Circuit's decision would undermine the cornerstone of corporate law — that a shareholder's personal liability is limited to the amount invested. The First, Second, Fifth, Eighth and Eleventh Circuits all have ruled that mere stock ownership is not enough. Instead, to be liable personally under CERCLA a corporate shareholder must participate in the corporation's waste handling or disposal activities. There is therefore a conflict among the Circuits on this crucial issue, which only this Court can resolve.

The Sixth Circuit's decision that attorneys' fees are recoverable under CERCLA without express congressional authorization is in conflict with the decisions of this Court. The Eighth Circuit also has ruled in this fashion. In contrast, the First, Ninth and Tenth Circuits have ruled, consistent with this Court's precedent, that attorneys' fees are not recoverable. As a consequence, a conflict exists among the courts of appeal on this issue as well.

Both issues are of paramount importance because of the vast numbers of CERCLA actions in which these questions arise, the huge financial liability associated with them, and the need for a uniform national treatment of potentially responsible parties under the statute. The sheer number of conflicting opinions demonstrates both the importance of the issues themselves and the need for a clear statement from this Court settling these questions.

I.

THE RECOVERY OF ATTORNEYS' FEES AS RESPONSE COSTS UNDER CERCLA

The Sixth Circuit's decision that attorneys' fees are recoverable as response costs by a private litigant in a CERCLA action is inconsistent with authority of this Court that a party may not recover attorneys' fees and costs of litigation absent a specific statutory authorization for such recovery. *Runyan* v. *McCrary*, 427 U.S. 160, 185, 96 S.Ct. 2586, 2602 (1976); *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 262, 95 S.Ct. 1612 (1975). CERCLA does not confer that right. CERCLA allows recovery only of a private litigant's costs of remedial actions and response. However, the statute's definitions of "remedial action" and "response", *see*, 42 U.S.C. 9601(24), 9601(25), do not include litigation by private parties. Therefore, attorneys' fees are not authorized for recovery.

Congress was aware of the option to make attorneys' fees recoverable. CERCLA specifically provides for recovery of attorneys' fees *by the government* in 42 U.S.C. 9604(b)(1). As well, CERCLA authorizes an attorney fee award to private litigants under its narrowly crafted "citizen's suit" provisions. *See*, 42 U.S.C. 9659(f). Thus, when Congress intended to create a right to recover the costs of litigation, it did so explicitly. Although it had the opportunity to provide for the recovery of attorneys' fees by private parties seeking contribution for response costs in the extensive 1986 amendments to CERCLA, it did not do so.

The Sixth Circuit's decision is also in conflict with several decisions by other circuit courts of appeals. *See*, *Juniper Dev. Group* v. *Kahn (In re Hemingway Transp., Inc.)*, 993 F.2d 915 (1st Cir. 1993) (litigation fees not recoverable); *Stanton Road Assoc.* v. *Lohrey Enterprises*, 984 F.2d 1015 (9th Cir. 1993) (CERCLA does not authorize the recovery of litigation costs by private litigants); *Key Tronic Corp.* v. *United States*, 984 F.2d 1025 (9th Cir. 1993), *reh. sought* (same); *Dedham Water Co., Inc.*, v. *Cumberland Farms Dairy, Inc.*, 972 F.2d 453 (1st Cir. 1992) (litigation related expenses not recoverable as response costs incurred by private parties under CERCLA section 107); *FMC Corp.* v. *AERO Ind.*, ___ F.2d ___, 1993 WL 246442 (10th Cir. 1993), attached at A-81 (private party may not recover attorneys' fees arising from litigation of private recovery action); *U.S.* v. *Hardage*, 982 F.2d 1436 (10th Cir. 1992), *reh. en banc den.* (defensive litigation costs not recoverable); *contra*, *General Electric Co.* v. *Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert.den.*, 111 S.Ct. 1390 (1991), (attorneys' fees recoverable as component of enforcement activities associated with clean-up).[1]

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[1] **There are also numerous federal district court decisions on both sides. *See, e.g., Fallowfield Dev. Corp.* v. *Strunk*, 766 F.Supp. 335**

(concluded on page 11)

These courts based their decisions on the American Rule as stated in this Court's opinions cited above. As stated by the Tenth Circuit in *FMC Corp.*:

> "We simply cannot agree with those courts that find an explicit authorization for the award of litigation fees from the fact that response costs include related enforcement activities. We recognize that CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others. It may be true that awarding the litigation fees incurred in that recovery would further this goal. Nonetheless, the efficacy of an exception to the American Rule is a policy decision to be made by Congress, not the courts. The desirability of a fee-shifting provision cannot substitute for the express authorization mandated by the Supreme Court. *See, Alyeska Pipeline Serv. Co.* v. *Wilderness Society*, 421 U.S. 240, 263-264 (1975). Accordingly, we conclude that a private party may not recover attorneys fees arising from the litigation of a private recovery action." *FMC Corp.* v. *AERO Ind., Inc.*, ___ F.2d ___, 1993 WL 246442,*5 (10th Cir. 1993), A-90.

The Ninth Circuit also criticized the approach taken by the Eighth Circuit in *General Elec. Co.* v. *Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert den.*, ___ U.S. ___, 111 S.Ct. 1390 (1991), and followed in *Donahey*:

(*continued from page 10*)

(E.D.Pa. 1991) (attorneys' fees not recoverable response cost under CERCLA); *New York* v. *SCA Services, Inc.*, 754 F.Supp. 995 (S.D.N.Y. 1991) (same); *Mesiti* v. *Microdot, Inc.*, 739 F.Supp. 57 (D.N.H. 1990) (attorneys' fees not recoverable); *Regan* v. *Cherry Corp.*, 706 F.Supp. 145 (D.R.I. 1989) (same); *T&E Industries, Inc.* v. *Safety Light Corp.*, 680 F.Supp. 696 (D.N.J. 1988) (same); *contra, Bolin* v. *Cessna Aircraft Co.*, 759 F.Supp. 692 (D.Kan. 1991) (attorneys' fees recoverable); *Allied Towing Corp.* v. *Great Eastern Petroleum Corp.*, 642 F.Supp. 1339 (E.D.Va. 1986) (attorneys' fees recoverable).

> "The Eighth Circuit's reliance on the policy underlying CERCLA to support its conclusion that Congress must have intended that litigants may recover attorneys' fees in a private response cost action is also misplaced. We cannot imply authority to award attorneys' fees because we determine that such a rule would enhance public policy." *Stanton Road*, 984 F.2d at 1020.

The court of appeals ignored *Runyan*, *McCrary* and the decisions of the other courts of appeals, based solely on the policy rationale that requiring private parties to shoulder the financial burden of litigation would defeat the purpose of providing private parties with a cause of action for response costs. The court stated that awarding attorneys' fees would encourage private parties to initiate cleanup of hazardous wastes without waiting for the responsible parties to act. The same can be said for any private cause of action created by statute and does not obviate this Court's mandate that such fees are recoverable only where authorized by statute:

> "* * * a court is not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the court's assessment of the importance of the public policies involved in particular cases." *Stanton Road*, 984 F.2d at 1018, *citing*, *Alyeska*, 421 U.S. at 269, 95 S.Ct. at 1627.

Even if its decision to rely on policy alone were permissible, however, the court of appeals ignored other equally important, countervailing policy considerations underlying the contribution provisions of CERCLA, such

as the encouragement of settlements. *See, Central Ill. Pub. Serv.* v. *Industrial Oil Tank*, 730 F.Supp. 1498, 1504 (W.D.Mo. 1990); Mason, Note, *Contribution, Contribution Protection, and Nonsettlor Liability Under CERCLA: Following Laskin's Lead*, 19 B.C.Env.Aff.L.Rev. 73, 88 (1991). The prospect that they may recover their fees removes much of the incentive for litigants to settle, thereby delaying cleanup. Encouraging settlements preserves parties' and EPA's resources which can then be expended to achieve the real goal — cleanup.

The position that attorneys' fees are recoverable as enforcement costs is clearly a minority view articulated by one other circuit court (in *General Elec., supra*) and which the Sixth Circuit followed merely by citing to a district court opinion without engaging in any reasoning of its own. The majority view, adopted by the First, Ninth and Tenth Circuits, follows the rule laid down in *Alyeska* and *McCrary* and should be confirmed by this Court in this case.

II.

THE STANDARD FOR CERCLA LIABILITY OF A CORPORATE SHAREHOLDER FOR THE LIABILITY OF THE CORPORATION

In effect, the Sixth Circuit has held in this case that the sole shareholder of a corporation is personally liable for the corporation's CERCLA liability, even though he had no direct participation in, involvement in or knowledge of the day to day operations of the business other than financial matters. Mr. Livingstone had no knowledge of or involvement in St. Clair Rubber's disposal practices. He invested his wealth in a limited liability venture, a corporation, and properly delegated its operations to officers and managers hired to conduct the business.

Mr. Livingstone's CERCLA liability was based solely on his stock ownership and the theoretical power to control the corporation's disposal practices, whether exercised or not, that stock ownership implied. This is the broadest standard for CERCLA liability adopted by any federal court to date. In so holding, the Sixth Circuit is in direct conflict with decisions of other courts of appeals. More importantly, this decision tears apart the fabric of corporate law in this country, without any legislative authorization.

A. The Sixth Circuit's Decision Is Not Supported By The Authorities On Which It Relies.

All of the cases cited in the opinion below require more than mere authority or power to control the corporation's waste disposal practices to impose liability. In *U.S.* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), for example, the Eighth Circuit held that a corporate officer could be held individually liable because he personally participated in conduct that caused contamination. The court reiterated that he was individually liable because he personally arranged for the transportation and disposal of hazardous substances on behalf of corporation and thus actually participated in the acts that made the corporation liable. *Northeastern Pharmaceutical*, at 744.[2]

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[2] **In the same case, however, the Eighth Circuit held a sole shareholder liable under the Resource Conservation and Recovery Act, 42 U.S.C. 6973(a) *et. seq.*, 7003(a), stating:**

> **"* * * Unlike Lee, Michaels was not personally involved in the actual decision to transport and dispose of the hazardous substances. As NEPACCO's corporate president and as a major NEPACCO shareholder, however, Michaels was the individual in charge of and directly responsible for all of NEPACCO's operations, including those at the Verona plant, and he had the ultimate authority to control the disposal of NEPACCO's hazardous substances." *Id.*, at 745.**

Based on this, *Northeastern Pharmaceutical* has been cited as authority for the proposition that authority or power to control is a sufficient basis for imposing *CERCLA* liability. *See, e.g., Donahey*, at 1254.

In *New York* v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), the court specifically did *not* determine whether an individual may be held liable personally merely because he was a shareholder and officer of a corporation "for it is beyond dispute that LeoGrande specifically directs, sanctions, and actively participates in Shore's maintenance of the nuisance." *Shore Realty*, at 1052. The court pointed out that a corporate officer who controls corporate conduct and thus is an *active participant* in that conduct is liable for the torts of the corporation.

In *Kelley* v. *Thomas Solvent Co.*, 727 F.Supp. 1554, 1561-1562 (W.D.Mich. 1989); *Kelley* v. *Arco Industries Corp.*, 723 F.Supp. 1214, 1219-1220 (W.D.Mich. 1989), Judge Enslen expressly stated that "it requires more than mere status as a corporate officer or director" to impose liability upon an individual. *Id.* Richard Thomas was the sole shareholder of Thomas Solvent Company but was not held to be liable for contamination resulting from the company's operations on motion for summary judgment. *Thomas Solvent*, 727 F.Supp. at 1545. Instead, Judge Enslen fashioned a fact-intensive test which imposes liability only if an individual (1) has the authority as part of his job duties to control the corporation's waste handling practices *and* (2) negligently or intentionally fails to prevent unlawful hazardous waste disposal. Judge Enslen's standard, although broader than that advocated by Mr. Livingstone, at least imposes liability as a function of all facts and circumstances of a given case, rather than solely because an individual is the major shareholder of a corporation. *Id. See, also, U.S.* v. *Ward*, 618 F. Supp. 884, 890-891, 895 (E.D.N.C. 1985) (president, chief operating officer, director and majority shareholder was personally liable because *he personally participated* in securing waste disposal contract which resulted in contamination).

B. The Sixth Circuit's Decision Conflicts With Decisions Of Other Courts Of Appeals.

The Sixth Circuit applied a standard of shareholder liability which conflicts with the standards enunciated by the First, Second, Fifth and Eighth Circuits. Each of these courts requires that the person actually and personally participate in the corporation's waste disposal practices before liability will result.[3] *New York* v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *Riverside Market Dev. Corp.* v. *Int'l Bldg. Products, Inc.*, 931 F.2d 327 (5th Cir. 1991), *cert. denied, Riverside market Ltd. Partner* v. *Prescott*, ___ U.S. ___, 112 S.Ct. 636, 116 L.Ed.2d 684 (1991); *U.S.* v. *Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 744 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).[4]

In addition, the Eleventh Circuit held that the trustees of Tufts College were not liable as operators of a wood treatment facility owned by the college, stating that to be an operator requires more than merely complete ownership and the concomitant general authority

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[3] **Likewise, numerous trial court decisions require personal participation by a corporate officer, director or shareholder before liability will be imposed on such individuals under CERCLA.** *Mass.* **v.** ***Blackstone Valley Elec. Co.*****, 777 F.Supp. 1036, 1039 (D.Mass. 1991);** ***Jacksonville Elec. Auth.*** **v.** ***Eppinger & Russell Co.*****, 776 F.Supp. 1542, 1546-1548 (M.D. Fla. 1991);** ***Levin Metals Corp.*** **v.** ***Parr-Richmond Terminal Co.*****, 781 F.Supp. 1454, 1457 (N.D.Cal. 1991);** ***CPC Int'l, Inc.*** **v.** ***Aerojet-General Corp.*****, 777 F.Supp. 549, 573 (W.D. Mich. 1991);** ***Mobay Corp.*** **v.** ***Allied-Signal, Inc.*****, 761 F.Supp. 345, 353-354 (D.N.J. 1991);** ***John Boyd Co.*** **v.** ***Boston Gas Co.*****, 775 F.Supp. 435 (D. Mass. 1991);** ***U.S.*** **v.** ***Carolina Transformer, Inc.*****, 739 F.Supp. 1030, 1036-37 (E.D.N.C. 1989);** ***Rockwell Int'l Corp.*** **v.** ***IU Int'l Corp.*****, 702 F.Supp. 1384, 1390 (N.D.Ill. 1988);** ***U.S.*** **v.** ***Northernaire Plating Co.*****, 670 F.Supp. 742, 747, (W.D. Mich. 1987),** ***aff'd sub nom U.S.*** **v.** ***R. W. Meyer, Inc.*****, 889 F.2d 1497 (6th Cir. 1989),** ***cert. denied*****, ___ U.S. ___, 110 S.Ct. 1527 (1990);** ***U.S.*** **v.** ***Conservation Chemical Co.*****, 628 F.Supp. 391, 419-20 (W.D.Mo. 1985);** ***U.S.*** **v.** ***Wade*****, 577 F.Supp. 1326, 1341 (E.D.Pa. 1983).**

[4] **Please see note 2,** ***supra*** **at p. 14.**

or ability to control that comes with ownership. *Jacksonville Elec. Authority* v. *Bermuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993), *citing*, *U.S.* v. *Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990). It continued:

> "CERCLA imposes cleanup liability on 'any person who at the time of disposal of any hazardous substance . . . *operated any facility* at which such hazardous substances were disposed of.' 42 U.S.C. § 9607(a). * * * The plain language of the statute leads to the conclusion that a person is liable as an 'operator' when that person actually supervises the activities of the facility. That is, the person must play an active role in the actual management of the enterprise." *Id.*, at 1110. Emphasis in original.

The Circuits have split on this issue as well, however. In *Nurad, Inc.* v. *William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992) the court held that active participation in waste disposal practices was not required to impose operator liability. Authority to control waste practices sufficed, so that a party who possessed authority to abate the damage but who declined actually to exercise that authority by undertaking cleanup efforts is not absolved of CERCLA liability.[5]

C. The Sixth Circuit Decision Must Be Reversed On Policy Grounds As Well.

1. THE *DONAHEY* OPINION PROVIDES NO GUIDANCE FOR DISTRICT COURTS.

Not only is the Sixth Circuit's opinion in this case in conflict with decisions in other courts of appeals, but it

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[5] Although the *Nurad* court stated this broad standard of liability, only the corporation was held liable. Two officers and shareholders with theoretical power to control were held not liable because their father dominated them.

also is unclear and provides no guidance for district courts attempting to apply CERCLA in similar cases. This is amply demonstrated by *Kelley* v. *Tiscornia*, Case No. 5:90-CV-62, (W.D. Mich., *decided*, April 23, 1993). There, the district court found itself unable to discern any useful standard from *Donahey*:

> "The cases cited by the court [in *Donahey*] stand for differing principles. * * * The court's citation to this incongruous line of cases provides no thread of reasoning through which this court is able to discern the standard by which a corporate officer is liable under CERCLA as an operator." *Kelley* v. *Tiscornia*, Memorandum Opinion and Order, at p. 10, n. 8.
>
> "* * * [T]his Court is unable to discern any additional guidance from the holding in *Donahey* * * *" *Id.*, at p. 10., A-72.

As a result, the *Tiscornia* court refused to hold Lester Tiscornia (the 83% shareholder) liable under CERCLA even though he clearly had ultimate power to control the corporation and its waste disposal practices, distinguishing *Donahey* on the ground that it involved a *sole* shareholder as opposed to *Tiscornia's three* shareholders. The district court even went on to adopt the "direct control or participation" standard for imposing corporate shareholder liability, as did Judge Zatkoff at the trial level in this case.

As evidenced by the number of decisions involving this issue, it is essential that a clearly articulated standard for holding shareholders liable be enunciated by this Court (1) to establish a legal rule for future guidance and (2) to ensure the uniformity of decisions within the federal courts. Clarification by this Court will enable the federal courts to achieve uniformity and continuity among their decisions.

2. THE SIXTH CIRCUIT'S DECISION IS CONTRARY TO SETTLED PRINCIPLES OF CORPORATE LAW.

The Sixth Circuit found only that Mr. Livingstone held an investment in the shares of St. Clair Rubber Company. Based solely on the authority those shares conferred (presumably to elect a board of directors, which would appoint officers, who in turn would hire managers and other employees), the court presumed Livingstone could and should have acted as a watchdog to insure that the corporate managers did their jobs and no contamination occurred. Rather than being able to rely on his managers and the limited liability nature of his investment, Mr. Livingstone now faces the prospect of paying personally for every mistake made by everyone at the company.

Individuals who buy shares of stock in a corporation do so with the knowledge that they put at risk their investment in those shares, but nothing more. *Klager* v. *Robert Meyer Co.*, 415 Mich. 402, 411, 329 N.W.2d 721 (1982). A shareholder is not liable for the acts, debts or status of the corporation except in very rare circumstances (e.g., if standards for piercing the corporate veil are met) or unless the individual has participated in the acts giving rise to liability. *U.S.* v. *Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 744 (8th Cir. 1986). It is the limited liability feature of corporate stock ownership that leads to investment in new, financially risky businesses. The corporate form allows individuals to choose how much they are willing to gamble in such enterprises. If investors in innovative enterprises had to bear personally the risk of failure, by providing a guarantee for the debts and liabilities of the company, capital would be very difficult to attract.

The Sixth Circuit's decision flouts these settled principles of corporate law and the realities of the business

world. It penalizes those individuals who invest in entrepreneurial or innovative small businesses who may hold a controlling interest. Such an individual may run afoul of the Sixth Circuit's judgment and become liable for huge CERCLA cleanup costs if the managers hired by the company fail to do their jobs properly and cause environmental contamination.

Moreover, practical considerations make the Sixth Circuit's power-to-control standard for liability impossible to evaluate and apply in a consistent fashion. A 100% stock ownership may be necessary to have sufficient power to control one corporation, whereas in another 51% or even 10% may be enough. Therefore, one would be hard-pressed to predict what level of stock ownership crosses the threshold from "limited liability" to complete liability.

The Sixth Circuit's premise appears to be that the controlling shareholder can assure that all environmental hazards will be prevented, absolutely, by appropriate corporate safeguards. Even a sole shareholder does not have the power to control every act by a corporate employee to assure that environmental contamination does not occur. If a mistake is made and thousands of gallons of hazardous substances spill on the ground, resulting in cleanup costs beyond the corporation's means, the damage could not be prevented. It already would have been done. And, the liability by the Sixth Circuit's judgment would be absolute.

Nowhere does CERCLA state or even suggest that it is intended to supplant the corporate law of Michigan and the other states. Yet, that would be the effect if this decision stands. As a policy matter, the courts should not attempt such a wholesale change in the relationship between federal and state law (and the resulting effect on the regulated public) without a clear mandate to do so from congress.

CONCLUSION

To resolve the conflicts among the courts of appeals on these important issues, and to correct a decision which construes CERCLA in a way which is inconsistent with the plain language of the statute and prior decisions of this Court, this Court should grant petitioner's request for a writ of certiorari.

Respectfully submitted,

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Dated: September 9, 1993

APPENDIX TO PETITION FOR CERTIORARI

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OPINION

(United States Court of Appeals — Sixth Circuit)

(Argued November 20, 1992; Decided March 9, 1993)

(Richard M. DONAHEY and PATRICIA A. DONAHEY, Plaintiffs-Appellants, Cross-Appellees, v. Helen L. BOGLE, Defendant-Appellee, Cross-Appellant, Seabourne [*sic*] S. Livingstone; H. Gordon Wood; St. Clair Rubber Company, a Michigan corporation, jointly and severally, Defendants-Appellees — Nos. 92-1128, 92-1151)

Before: KEITH and JONES, Circuit Judges;
and ALLEN, Senior District Judge.*

CHARLES M. ALLEN, Senior District Judge.

The appeals and cross appeals of the parties arise out of a judgment entered following a lengthy bench trial and a 48-page Findings of Fact and Conclusions of Law. The issues presented to the trial court and to this Court involve the respective rights of the Donaheys and Helen Bogle under Michigan land purchase law and the rights and liabilities of all the parties under the Comprehensive Environmental Response Compensation and Liability Act (hereinafter CERCLA), 42 U.S.C. § 9601 et seq.

The Donaheys appealed from the judgment of the trial court holding that Richard Donahey was liable under his land purchase contract to Helen Bogle. In addition the Donaheys appealed from the judgment of the trial court that their claims under CERCLA were without merit and that they were not entitled to

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* **The Honorable Charles M. Allen, Senior United States District Judge for the Western District of Kentucky, sitting by designation.**

declaratory judgment relief for future cleanup of the property purchased by the Donaheys. Helen Bogle appeals from the judgment which held that she was a "responsible party" under CERCLA and she contends that she is entitled to a monetary judgment in excess of that awarded by the trial court. Both Helen Bogle and the Donaheys challenge the findings of the court that Seabourne Livingstone was not a "responsible party" under CERCLA.

In 1962, St. Clair Rubber Company rented Marysville, Michigan property for a period of ten years. The lessor was Helen Bogle, who is the sister of Seabourne Livingstone, the sole stockholder of all the stock of St. Clair Rubber Company. The property was again leased in 1972 for another ten year period.

St. Clair's manufacturing processes left a waste product that was combined with a solvent. This mixture was drained into 55 gallon drums and designated as sludge. In the early 1970s, St. Clair transported 12 to 20 barrels or drums of sludge to the property every six months for disposal. After allowing the sludge to drain from the barrels for approximately one week, the employees returned to burn the sludge. Some time in the 1970s, St. Clair stopped its dumping and burning at the property.

In 1981, Bogle listed the property for sale. Donahey, the majority stockholder of a manufacturing firm, inspected the property and charted an area used as a dump. His attorney sent a letter to Bogle expressing concern over the presence of a "dump." To allay concern, St. Clair and Donahey entered into an "Agreement to Clean Up Dump", in which St. Clair promised to remove any hazardous substances found on the property and to restore the land to an environmentally satisfactory condition. The agreement included St. Clair's

promise to indemnify Donahey for costs resulting from St. Clair's contamination of the land.

On the same day in 1982 on which Donahey and St. Clair executed the clean up agreement, Donahey purchased the property from Bogle for $115,000. Their contract provided for a down payment of $28,750, with the balance of the purchase price to be paid over a period of ten years at 11% interest in monthly installments of $980.31.

In 1985, following the publication of a newspaper article revealing the existence of environmental contamination at the site, the Michigan Department of Natural Resources (hereinafter "MDNR") sent letters designating each party to this law suit a "potentially responsible party," and requesting certain monitoring and clean-up activities. In 1986, the Donaheys employed an environmental consultant, Lawrence Halfen, to advise them with respect to the contaminated property.

Dr. Halfen's preliminary investigation found a number of rusting and corroding barrels and non-hazardous waste materials which posed no immediate threat to the environment. After receiving authorization to proceed, he began work in August 1987, collecting and disposing of these old barrels and other materials. He removed approximately 350 cubic yards of material from the site at a cost of approximately $28,000.

However, at the end of the third day of removing the barrels and scraping the site, workers discovered five pits that contained hazardous substances. Dr. Halfen decided to address the problem on a temporary basis. He removed the materials from the pits so that he could assess their nature and volume. After draining the lagoon, he consolidated the pit materials with contaminated and uncontaminated soils taken from other areas at the site and placed the mixture in the lagoon basin.

He placed a cap over the mound of materials, erected a snow fence around the area, and obstructed roadway access to the site.

Dr. Halfen characterized his treatment of the materials as a judgment call in the face of an immediate threat. He did not seek the advice of the MDNR. He completed his operations in late August 1987, and on September 1, 1987, he telephoned the MDNR representative to explain what he had found and what he had done. The MDNR never communicated to Donahey or to Dr. Halfen any protests about the work that Dr. Halfen did.

Subsequently, Dr. Halfen proposed further clean up measures at an estimated cost of $447,500. Unwilling to undertake the cost of further clean up efforts, the Donaheys abandoned the property in 1990.

The Donaheys filed suit asserting statutory and common law causes of action against Bogle, St. Clair Rubber and Seabourne Livingstone. They sought to rescind the purchase contract with Bogle, to recover costs incurred in attempting to clean up the environmental situation, and to recover attorneys fees of more than $279,000 incurred in these proceedings. By counterclaim, Ms. Bogle alleged a breach of the land purchase contract and failure to pay the sums due under that contract and she sought a judgment for the unpaid amounts plus interest. In addition, she asked for a declaration that she was not a covered party under CERCLA, and that Livingstone, Mr. Donahey and Mrs. Donahey were all covered parties.

The matter of rescission was first addressed on a summary judgment motion by District Judge Harvey, who found that the Donaheys were not entitled to rescission. After trial, District Judge Zatkoff reiterated that ruling, and made additional findings and conclu-

sions, including the following pertinent to these appeals:

1. Mrs. Bogle was entitled to judgment for the unpaid balance owing on the land purchase contract plus interest on past due payments at the rate of 11% per year from June 8, 1987 until March 14, 1989 (the date of filing of the counterclaim), together with pre-judgment interest from March 14, 1989 to the date of the judgment and judgment interest after the date of judgment.

2. Richard Donahey, Helen Bogle and St. Clair Rubber were covered persons under 42 U.S.C. § 9601 et seq. with respect to the environmental contamination at issue, but neither Pat Donahey nor Livingstone were covered persons.

3. None of the parties had incurred any recoverable response costs under CERCLA and the Donaheys were not entitled to a declaration of future liability pursuant to 42 U.S.C. § 9613(g)(2).

4. Richard Donahey was required to accept title to the property and if he failed to do so, Mrs. Bogle was entitled to present the judgment as deed of ownership to Richard Donahey.

5. Mrs. Bogle had no cause of action against St. Clair Rubber, Livingstone, and the Donaheys under CERCLA.

Before reaching the question of who is responsible for the cost of clean up, we must first dispose of the argument of Donahey that he is entitled to rescind the contract for the purchase of the land. He argues that

the environmental contaminants that he discovered after the purchase contract was executed constituted an encumbrance that prevented Bogle's transferring clear title to the property. The trial judge properly held that an "encumbrance" is a mortgage or a mechanics lien or tax lien or something of that nature that diminishes the value of the title to the property; environmental contaminants may diminish the value of the realty, but they do not constitute an encumbrance because they do not affect title. Furthermore, the contract between Donahey and St. Clair, by which St. Clair agreed to clean up the environmental contamination provided the trial court with ample evidence to support the determination that Donahey knew before purchase that there were environmental contaminants on the property.

The trial judge was also correct in finding that Donahey had breached the contract with Bogle. The record clearly shows that as early as 1987 Donahey stated that he would not make any further payments on the real estate contract. This was anticipatory breach under Michigan law. *Jackson* v. *American Can Co., Inc.*, 485 F.Supp. 370 (W.D. Mich. 1980), and *Brauer* v. *Hobbs*, 151 Mich. App. 769, 391 N.W.2d 482 (1986).

Bogle contends that the trial court erred in calculating interest on her monetary award and that she is entitled to both statutory and contractual interest from March 14, 1989 to the date of judgment. The only Michigan authority cited on this point, *McGraw* v. *Parsons*, 142 Mich.App. 22, 369 N.W.2d 251 (1985), fully supports Bogle's position.

We turn next to the issues raised under CERCLA. First, the trial court held that the Donaheys were not entitled to recover any costs under CERCLA for the actions which they took in an attempt to cleanup the

property. Secondly, it held that Richard Donahey, Bogle, and St. Clair Rubber were responsible parties for the contamination of the property under 42 U.S.C. § 9607 but also held that Seabourne Livingstone was not liable as an owner or operator because he did not actively participate in the day-to-day activities of the corporation and had no knowledge of the environmental contamination created by it. In addition Bogle appeals from the findings that she was a responsible party as a former owner of the property, and also appeals from the court's findings that Patricia Donahey was not a covered person under 42 U.S.C. § 9607(a).

The trial court correctly found that Richard Donahey and Helen Bogle and St. Clair were "responsible parties" under 42 U.S.C. § 9607(a). However, the court erred in concluding that Seabourne Livingstone was not liable as an owner under CERCLA. The evidence clearly established that Livingstone had the authority to prevent the contamination of the property by his corporation; thus, as a matter of law, Livingstone was a responsible party. *Kelley* v. *Thomas Solvent Co.*, 727 F.Supp. 1532 (W.D. Mich. 1989); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1043 (2d Cir. 1985); *U.S.* v. *Ward*, 618 F.Supp. 884 (E.D. N.C. 1985); and *U.S.* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986).

The trial court rejected the contention that Halfen's actions were a legitimate "judgment call," and concluded that the Donaheys were not entitled to recover any of their costs incurred in the attempt to clean up the property. In making that determination, the court relied upon evidence that the substances discovered at the property were hazardous wastes within the meaning of Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6903(5). Section 6903(5) defines hazardous waste as a compound that may cause death or serious

permanent illness or pose a health risk when improperly stored. ENVIRONMENTAL PROTECTION AGENCY regulations define hazardous waste at 40 C.F.R. 261.31, and among the chemicals so designated are benzene, toluene, and xylene, substances used in St. Clair's rubber manufacturing processes and in churn-washing procedures at St. Clair. Halfen's testimony corroborated the Judge's finding with reference to hazardous wastes.

The trial court found that the Donaheys' clean up effort did not comply with RCRA regulations in that Donahey failed to obtain an RCRA permit and failed to conduct a detailed physical and chemical analysis of a representative sample. See 40 C.F.R. § 270.1(c)(1)(ii), and 40 C.F.R. § 264.13. The court also found that the Donaheys had failed to secure the site against unknowing and unauthorized entry by persons or livestock, and based his finding on evidence that the Donaheys had merely placed a snow fence around the consolidated pile in the large lagoon. The court also found that the Donaheys did not receive a permit or permit waiver for their storage of hazardous waste.

The trial court further relied on evidence that the Donaheys provided no drainage control, and that the consolidation of the wastes in the large lagoon increased the surface area of waste exposed to top soil by 50%. The court also found that by relocating the waste from the rubber pile to the large lagoon, Halfen spread the contamination to a relatively untainted portion of the property. Based on these factors, the trial court held that the Donaheys' actions did not facilitate the goals underlying CERCLA nor did they in any way improve the condition of the defiled property.

In order to recover the costs incurred in employing Halfen and attempting to improve the environmental condition of their property, the Donaheys are required

to show that the property on which hazardous substances were contained was a facility under CERCLA's definition of that term, that the release or threatened release of any hazardous substance from the facility had occurred, that such release or threatened release caused them to incur response costs that were necessary and consistent with the National Contingency Plan (NCP), and that defendant was one of the statutory classes of persons subject to liability. *3550 Stevens Creek Assoc.* v. *Barclays Bank*, 915 F.2d 1355 (9th Cir. 1990). In applying these standards to this case, the trial judge correctly held that an element of the Donaheys' prima facie case was a showing that the response costs incurred were consistent with or substantially in compliance with the NCP.

The trial court's findings that the cleanup work attempted by Halfen actually did more damage than benefit is substantiated by the testimony of Hunt, an expert witness, who stated that when Halfen consolidated non-hazardous material with hazardous material he contaminated the nonhazardous so that it would all have to be treated as hazardous. That, in turn, would make disposal much more complicated and expensive. Hunt estimated that it would have cost $305,000 in 1987 to dispose of the 1200 yards of material mounded in the lagoon, whereas it would have cost only $178,000 to dispose of the 800 yards of material actually taken from the pits. Additionally, Hunt testified that Halfen had increased the health risks by creating an attractive nuisance and by necessitating repeated human contact with the hazardous material.

Although consistency with the NCP is a necessary element for recovery of remedial costs, it does not necessarily follow that consistency with the NCP is required for recovery of monitoring or investigative

costs. In *Carlyle Piermont Corp.* v. *Federal Paper Board Co.*, 742 F.Supp. 814 (S.D. N.Y. 1990), the Court held that such costs are recoverable without regard to compliance with the NCP. *See also Artesian Water Co.* v. *Government of New Castle County*, 851 F.2d 643 (3rd Cir. 1988) (monitoring and impact evaluation costs recoverable regardless of existence of other compensable response costs). This Court believes the *Carlyle Piermont* reasoning on the instant issue is sound, and we will remand for award of the Donaheys' initial investigation costs.

Plaintiffs appealed from the decision of the trial court refusing to award them attorneys fees of $279,000. The trial court's refusal rests primarily on the American Rule, although he also points out that there is specific statutory authorization for the government to recover attorneys fees and no such specific authorization for private parties. However, this Court prefers to follow the reasoning of cases such as *Bolin* v. *Cessna Aircraft Co.*, 759 F.Supp. 692 (D. Kan. 1991), *Shapiro* v. *Alexanderson*, 741 F.Supp. 472 (S.D. N.Y. 1990), and *General Electric Co.* v. *Litton*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1390, 113 L.Ed.2d 446 (1991). The *Bolin* opinion made the following persuasive statement:

> By providing private parties with a federal cause of action for the recovery of necessary expenses in the cleanup of hazardous wastes, Congress intended § 107 as a powerful incentive for these parties to expend their own funds initially without waiting for the responsible persons to take action. [citations omitted]. The court can conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs.

759 FSupp. at 710.

In following cases cited immediately above, we recognize that there are several cases to the contrary, such as *T & E Industries, Inc.* v. *Safety Light Corp.*, 680 FSupp. 696 (D. N.J. 1988); *Mesiti* v. *Microdot, Inc.*, 739 FSupp. 57 (D. N.H. 1990); *Regan* v. *The Cherry Corporation*, 706 FSupp. 145 (D. R.I. 1989).

We recognize that the Donaheys' complaint included ten causes of action, and that the only recovery they have achieved is the very small amount awarded for investigative costs. We remand to the district court the question of amount of attorneys fees in light of the above observations.

In conclusion, the judgment of the trial court is affirmed as to all aspects of the case except for the following:

1. The judgment is reversed insofar as it does not consider Seabourne Livingstone a responsible party under CERCLA.

2. The judgment is vacated with respect to cost of investigation, and the matter is remanded for determination and award of these costs.

3. The judgment is vacated with respect to the interest recoverable by Helen Bogle, and the matter is remanded for determination and award of statutory and contractual interest from March 14, 1989 to the date of judgment in lieu of the pre-judgment interest which the trial judge awarded her for that period of time.

4. The judgment denying attorneys fees in toto is vacated, and the matter remanded for determination of what constitutes reasonable attorneys fees recoverable under CERCLA.

JUDGMENT

(United States Court of Appeals — Sixth Circuit)

(Filed March 9, 1993)

(RICHARD M. DONAHEY; PATRICIA A. DONAHEY, Plaintiffs-Appellants/Cross-Appellees, v. HELEN L. BOGLE, Defendant-Appellee/Cross-Appellant, SEABOURN S. LIVINGSTONE; H. GORDON WOOD; ST. CLAIR RUBBER COMPANY, a Michigan corporation, jointly and severally, Defendants-Appellees — NOS: 92-1128: 92-1151; ON APPEAL from the United States District Court for the Eastern District of Michigan at Detroit.)

Before: **Keith** and **Jones**, Circuit Judges;
Allen, Senior District Judge.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed in part, reversed in part, vacated in part, and the case is remanded for further proceedings in accordance with the opinion.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

Issued as Mandate: *June 25, 1993*
COSTS: *None*

(*Certification Omitted*)

ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed June 15, 1993)

(RICHARD M. DONAHEY; PATRICIA A. DONAHEY, Plaintiffs-Appellants/Cross-Appellees, v. HELEN L. BOGLE, Defendant-Appellee/Cross-Appellant, SEABOURN S. LIVINGSTONE; H. GORDON WOOD; ST. CLAIR RUBBER COMPANY, Defendants-Appellees — Nos. 92-1128/1151)

BEFORE: KEITH and JONES, Circuit Judges;
ALLEN, Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

(Certification Omitted)

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* **Hon. Charles M. Allen sitting by designation from the Western District of Kentucky.**

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated October 1, 1991)

(RICHARD M. DONAHEY AND PATRICIA A. DONAHEY, Plaintiffs, vs. HELEN L. BOGLE, Defendant and Counter-Plaintiff, and SEABOURN S. LIVINGSTONE, H. GORDON WOOD AND ST. CLAIR RUBBER COMPANY, a Michigan Corporation, jointly and severally, Defendants — CASE NO. 87-CV-74771; HON. LAWRENCE P. ZATKOFF)

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 1st day of October, 1991.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF,
UNITED STATES DISTRICT JUDGE.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter is before the Court on plaintiffs' civil action under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.* to recover costs expended in an alleged clean-up of environmentally contaminated realty. Defendant Helen Bogle filed a counterclaim against plaintiffs for contribution and filed crossclaims against the other defendants for contribution. A bench trial was conducted from May 2 to May 15, 1991, excluding weekends. Upon the Court's request, each party filed post-trial proposed findings of fact and conclusions of law and supplemental briefs on select legal and factual issues raised at trial. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court herein formal-

izes the findings of fact and conclusions of law as earlier set forth on the record.

JURISDICTION

Jurisdiction is predicated upon §§ 1331 and 1367 of Title 28, United States Code.

FINDINGS OF FACT

Based upon the record established in this case and upon proofs presented to the Court at trial, the Court makes the following findings of fact:

The property that is the subject of this civil action is located at 2408 Wills, in the City of Marysville, St. Clair County, Michigan. Such property shall hereinafter be referred to as "the property." The property is near the St. Clair River.

The City of Marysville draws its drinking water from the St. Clair River. The surface water intake is located one and one half miles upstream from the property. Approximately 3000 people in the area use private wells for their drinking water supplies. The geology of the area is characterized by a ninety foot thick layer of clay overlying a glacial sand and gravel aquifer from which private wells draw. The property is also near a wetland. The property can be viewed from Carlton Street, which is west of Wills.

Numerous rusted, corroded drums and rubber piles are present on the property.

In 1942, the Dow Chemical Company first developed the property for industrial production. In 1959, H. Scherer & Company acquired title to the property from Fort Diecasting Company.

Defendant-Helen Bogle[1] and Seabourn S. Livingstone are siblings. Their grandfather founded St. Clair Rubber Company, which their father, Seabourn R. Livingstone, subsequently came to own and operate. During his ownership of the company, Seabourn R. Livingstone acted as president and chief executive officer.

On August 16, 1961, Seabourn R. Livingstone died. Shortly thereafter, his son, defendant-Seabourn S. Livingstone, acquired all of the outstanding stock of St. Clair Rubber Company.

Defendant St. Clair Rubber Company ("St. Clair") began operating a rubber manufacturing facility in the mid 1950s at the Will Street property.

On October 31, 1962, defendant Helen L. Bogle ("Bogle") acquired title to the property as part of a distribution of assets from H. Scherer & Company, a family holding company.

On October 31, 1962, St. Clair Rubber Company leased the property from Helen Bogle ("Howard" at the time) for a term of ten years. The parties subsequently renewed the lease for a period of ten years, thereby creating a continuous landlord-tenant relationship for a twenty year period. St. Clair Rubber's regular monthly rent payments to Bogle terminated in 1979.

Throughout the time period relevant to this case, St. Clair Rubber operated three industrial facilities: (1) the "main plant" located on Michigan Avenue in Marysville, Michigan, (2) the "adhesives plant" located on Mill Street in Marysville, Michigan, and (3) the Will Street "tank plant" (also known as the "poly plant") located on the property that is the subject of this case.

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[1] **Helen Bogle has also had the last names "Howard" and "Spender."**

St. Clair's manufacturing processes utilized various organic compounds, including aromatic compounds such as, but not limited to, methyl-ethyl-ketone ("MEK"), benzene, xylene, hexane, toluene and various other compounds such as resins and rubber raw materials.

From October 31, 1962 to January 6, 1982, as landlord, Bogle never personally inspected nor caused anyone on her behalf to visit or inspect the property, despite having retained the right to conduct inspections under both leases.

One of St. Clair's manufacturing processes involved the blending of resins, solvents (for example, MEK, toluene, benzene, and other aromatic organic substances) and other raw materials to produce various rubber products and adhesives. These materials were blended in large industrial churns. This blending process was originally performed in a churn room located at the main plant. However, the churn room was subsequently relocated to the adhesives plant at Mill Street.

The blending process left a waste product on the churns that St. Clair removed by treating the churns with additional solvent. The waste product combined with the additional solvent, and the resulting "sludge" was drained off into 55 gallon drums. The drums containing the sludge were marked to indicate the type of washing solvent used and the fact that they were waste products. The sludge stored in the drums was multicolored — green, black, red, orange and yellow.

In 1955 at the main plant, 55 gallon drums of sludge were emptied on to flat ground on a large site and their contents were burned as a method of disposal. The city of Marysville subsequently prohibited St. Clair from disposing of its waste products by burning it on the open ground at the main plant.

The sludge was routinely submitted for reclamation. However, reclamation stopped, and St. Clair began disposing of its waste products in the early 1970s.

In the early 1970s, at the subject property, St. Clair created a pond measuring 60 feet in length, 60 feet in width and 2 feet in depth. The pond was located west of the only building located on the property — between the building and the power lines.

Typically, St. Clair employees transported 12 to 20 barrels or drums of sludge from the adhesive plant to the property every six month[*s*] for disposal. The employees allowed the sludge to drain from the barrels for approximately one week, after which they returned to burn the sludge. At the behest of the City of Marysville, St. Clair stopped its dumping and burning at the property in the 1970s.

In 1981, Bogle listed the property for sale. Craig Mercier ("Mercier") was Bogle's agent. In the fall of 1981, Craig Mercier ("Mercier"), then a salesperson with Schostak Bros. & Co., Inc., visited the property in order to calculate a sale price. To this end, Mercier inspected the building, but not the western portion of the property where the dumping and burying of hazardous wastes occurred.

In the fall of 1981, Richard Donahey expressed an interest in purchasing the property. Richard Donahey is the majority stockholder in a closely held corporation, United Brass Works, Inc., which owns a subsidiary, Daca, Inc. His interest in the property arose out of its close proximity to Daca manufacturing facilities.

Richard Donahey inspected the property, and based on his inspection, charted an area on the property used as a dump.

In the fall of 1981, Richard Donahey was familiar with the risk of environmental liability posed by the maintenance and use of industrial realty. This knowledge stemmed from his liability for polychlorinated butyl ("PCB") contamination on Daca, Inc. land that was acquired by United Brass Manufacturing, Inc.

On December 11, 1981, Edward Schulte, acting as Richard Donahey's attorney, sent a letter to Bogle expressing concern over the presence of a "dump" on the property.

To allay Richard Donahey's concern over the environmental condition of the property, St. Clair, the former tenant of the property, entered into an "Agreement to Clean Up Dump" ("the agreement" — trial exhibit 6) with Richard Donahey, which was executed on January 6, 1982, the same day that Richard Donahey would eventually execute a land contract with Bogle. In the agreement, St. Clair Rubber promised to remove any hazardous substances found on the property and to restore the land to an environmentally satisfactory condition. Additionally, the agreement includes St. Clair Rubber's promise to indemnify Donahey for costs resulting from St. Clair Rubber's defilement of the land.

Before he purchased the property, Richard Donahey knew that the land may have been environmentally defective, may have presented federal environmental violations, and had the potential of spawning a lawsuit. Richard Donahey also knew that the property had been used as an industrial dump. As indicated by the evidence introduced at trial, particularly but not limited to the "agreement to clean up dump," despite Richard Donahey's understanding that his knowledge of the environmental condition of the property was limited, he executed the land contract for the sale of the property.

Mercier was aware that the Donaheys learned of the dump after the purchase agreement was executed on November 10, 1981.

On January 6, 1982, Richard Donahey purchased the property from Bogle on a land contract.[2] The purchase price for the property was $115,000, with $28,750 paid down, and the balance of the purchase price at 11% interest to be paid in monthly installments of not less than $980.31.

From 1962 to 1982, defendant-Seabourn S. Livingstone was the sole shareholder, chairman of the board of directors, and treasurer of St. Clair Rubber Company.

St. Clair's Michigan Annual Reports for Profit Corporations for the period spanning 1979-1983 repeatedly and consistently indicate that its term of existence was to expire on March 18, 1983. In the early 1980s, St. Clair Rubber dissolved and ceased to exist as a corporation.

Former employees of St. Clair provided the Michigan Department of Natural Resources ("MDNR") with detailed accounts of St. Clair's waste disposal practices.

A December 1985 newspaper article publicly revealed the existence of environmental contamination on the property for the first time. Bogle and Richard Donahey learned of the article shortly after it was published.

Soon thereafter, the MDNR sent each party to this suit a letter designating each as a potentially responsible party, and requesting the performance of certain monitoring and clean-up activities.

In the spring of 1986, the Donaheys hired an environmental consultant, Lawrence Halfen, to supply technical

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2 Richard Donahey deeded the property to himself and his wife, Patricia Donahey, on January 28, 1982. On September 7, 1988, Richard and Patricia Donahey deeded the property to Richard Donahey.

assistance in determining their course of action. At all times relevant hereto, Halfen acted as agent of and on behalf of the Donaheys.

Halfen met Richard Donahey on the property in June of 1986 to inspect, survey and photograph the land. The photos painted a picture of a piece of land that was clearly used as an industrial dump site: corroded drums, hardened rubber-like deposits and surface lagoons dotted the landscape. Halfen also collected samples of water from the western portion of the large lagoon, rubber samples from the small rubber pile within the fenced area, and rubber samples from the large rubber pile outside the fenced area. Halfen also noted the small and large rubber piles that were inside and outside the fenced area, respectively.

Based on the totality of the circumstances — the appearance of the drums and barrels, the hardened rubber deposits on the surface that Halfen believed to have once contained solvents, and the test results obtained by environmental officials — the Court concludes that a "release" of solvents occurred before Richard Donahey purchased the property.

In August, 1986, the EPA and MDNR authorized Ecology and Environment, Inc. ("EE")[3] to test soil samples from the property. Halfen met EE employees on the property and accompanied them in order to obtain split samples.[4] EE took five split samples that day. EE performed inorganic and organic analyses on the samples. The test results appeared in a Field Investigation Team Report ("FIT Report"), the results of which were pro-

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[3] Ecology and Environment, Inc. is a private corporation that contracts with EPA and MDNR to provide testing services.

[4] To achieve "split samples," a sample is literally split into two portions so that the test results obtained from one sample can be verified by running an independent analysis on the other sample.

vided to the Donaheys' attorney at that time, David Maurer, and Halfen.

On August 3, 1987, plaintiffs notified Bogle that all future payments on the land contract would be placed in escrow.

Plaintiffs have failed or refused to pay any monthly installments due under the land contract since July, 1987, inclusive.

The belief that a release had occurred, the FIT Report, and pressure from the MDNR compelled Halfen to recommend that the visible surface contamination be transported to and disposed of in a landfill, and that the surface lagoons be drained and filled. In this respect, Halfen prepared a proposal for the Donaheys' review. Halfen's proposal included plans for collecting the surficial rubber deposits and trash, securing a license for disposal, loading and transporting the material to a landfill, and restoring the topography of the site. The approximate cost of the surficial clean-up was $30,000-35,000.

After reviewing Halfen's proposal to remove barrels and wastes on the surface of the property, the Donaheys decided to permit Halfen to perform a "surficial" clean-up of the western portion of the property. On behalf of the Donaheys, attorney Maurer instructed Halfen to execute the proposed clean-up. As part of the clean-up, Halfen planned to fill two lagoons that were on the property. The larger lagoon measured about 100 feet in length by 40 feet in width, by 5 feet in depth. The smaller lagoon was approximately the same depth and measured 27 feet long and 22 feet wide.

Halfen was on the property from August 24, 1987 to August 28, 1987.

Halfen first removed the wire fence that partially surrounded the dump site, some fibrous drums, rubber deposits, the small rubber pile, and part of the large rubber pile, totalling 350 cubic yards of hazardous materials. The materials, tainted by the hazardous wastes, were sent to landfills for disposal.

While directing a backhoe in the surficial clean-up effort, Halfen noticed a swath of gelatinous material — about six to twelve inches wide, six to eight feet long, and six inches deep — along the backhoe's tire track. Halfen also heard complaints from the machine operator that the ground was less than stable and was not adequately supporting the great weight of the backhoe. Halfen grew suspicious and probed the nearby ground with a six foot metal rod. The rod easily penetrated the ground, and when extracted, bore the distinctive and strong odor of solvents and aromatic organic compounds. Halfen decided to explore the region around the area of exposure and instability by digging with the backhoe and, in doing so, discovered buried "pits" ranging from six to ten feet deep. These pits contained corroded drums and large quantities of multi-colored, gelatinous material composed of solvents and aromatic organic compounds of the type used by St. Clair in its manufacturing processes. The western boundary of the pit area was ten feet from the eastern border of the large lagoon.

Halfen's actions resulted in the discovery of five buried pits. These pits were separate and distinct from the large and small lagoons situated on the surface of the property, although the small lagoon did sit over part of the pit area. Together, the five pits contained 800 cubic yards of hazardous material.

At that point, the property presented Halfen with five pits encasing gelatinous material containing solvents

and aromatic organic compounds, two lagoons, and part of the large rubber pile.

After consulting with and receiving the approval of the Donaheys, Halfen decided to excavate the pits and place their contents in the large lagoon. To achieve this result, Halfen drained the large lagoon of its water and packed rubber deposits from the large rubber pile around the perimeter of the large (and drained) lagoon. Halfen used the backhoe to transfer the contents of the pits into the large lagoon. Clean fill dirt was then used to fill the pit area, and pit area was restored to an even grade.

According to Halfen, the consolidation effort stemmed from his concern for site safety and containment problems caused by the discovery and exposure of the underground pits. Specifically, Halfen worried about water run-off, fire threat, and the presence of an attractive nuisance.

At least two surficial locations on the property evidenced solvent contamination: the bottom of the large lagoon was dotted with rubber deposits that had the distinct odor of solvents, and the southern half of the large rubber pile had a definite solvent odor.

The consolidated waste pile, not including cover materials, in the large lagoon totalled 1200 cubic yards. To this was added soil from the large rubber pile area. A black plastic tarp was used to cover the entire mound, and clean fill was placed over the tarp to keep it in place. Halfen erected a snow fence bearing "hazardous waste" warning stickers around the entire pile. The total volume of the consolidated waste pile — including the dirt from the large rubber pile, the clean fill, and the tarp — is 1600 cubic yards, and the consolidated waste pile (and all of its augmentations) rises three feet above grade.

Despite the additional time and effort necessitated by the discovery and consolidation of the underground pits, the added risk of handling hazardous materials, and the altered nature of the clean-up effort, the actual cost of the clean-up was $33,000, very closely approximating Halfen's initial cost estimate for the simple surficial clean-up.

On September 1, 1987, Halfen reported his activities on the property to the MDNR.

In late 1987, Halfen prepared a second proposal for cleaning-up the property and it included consideration of the gelatinous waste material discovered in the five pits. The estimated cost of the second clean-up was approximately $450,000. The Donaheys never approved the second proposal. Because of changes in the law since 1987, the current cost of cleaning-up the property approximates $1,000,000.

Donaheys' claimed response costs consist of two components: (1) $53,195.97 for consulting fees, including $33,000 paid to Halfen for the consolidation of the hazardous materials in one mound on the subject property, and (2) $279,366.80 for attorney fees, most of which were generated by the Detroit based law firm of Dickinson, Wright et al. for legal services provided up to, but not including preparation for, trial.

In July of 1987, plaintiffs stopped making payments on the land contract. Instead, they deposited an amount equivalent to the monthly payments in an escrow account in the hope that such monies could be used to finance a clean-up of the property.

On March 14, 1989, Bogle informed plaintiffs that she was accelerating the payments due under the land contract.

Without invitation, in August of 1990, Richard Donahey tendered quit claim deeds to Bogle in an effort to sur-

render any and all interests he had in the property. Bogle did not assent to the delivery of the deeds. Richard Donahey knew that the grantee, Bogle, did not assent to the delivery of the quit claim deeds.

After Richard Donahey's attempt to convey his interest in the property to Bogle by way of quit claim deed, he assumed that the land contract no longer imposed a duty on him to make monthly payments and to pay for insurance and utilities. As a result, in October of 1990, Richard Donahey ceased depositing monthly payments in escrow, stopped insurance payments, stopped utility payments, and abandoned the property.

In November of 1989, the Donaheys filed their complaint. Judge Harvey, the Judge to whom this case was originally assigned, partially granted Bogle's motion to dismiss all of the claims in the Donaheys' complaint, leaving only the CERCLA claim. Prior to trial, this Court denied the Donaheys' motion to reinstate their rescission claim and denied Bogle's emergency motion for declaratory relief.

CONCLUSIONS OF LAW AND DISCUSSION

I.
LAND CONTRACT CLAIMS[5]

In his complaint, Richard Donahey claims that because he is merely a land contract vendee holding only an equitable interest in the land, he does not hold legal title to the property and, therefore, cannot be the current owner of the property. Furthermore, Richard Donahey contends that whatever ownership interest he

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5 The Court considers the land contract issues first because they impact the Courts subsequent analysis of the parties' CERCLA claims, specifically the determination of the current owner under CERCLA's liability provision found at 42 U.S.C. § 9607(a)(1).

held in the land by virtue of the land contract was terminated when he delivered quit claim deeds to Bogle.

Bogle alleges that although she holds legal title as the land contract vendor, she holds such merely as security on the debt and, therefore, cannot be considered the current owner of the property. With respect to Richard Donahey's tender of the quit claim deeds, Bogle argues that no interest in the property passed to her because she never accepted the deeds. Additionally, in her counterclaim, Bogle argues that the Donaheys breached the land contract by halting payments on the land contract in July of 1987. Bogle further claims that as a result of plaintiffs' breach of contract, she rightfully accelerated the payments on the land contract in March of 1989. Bogle claims that she is entitled to specific performance of the land contract and recovery of the accelerated amount due, $104,499.00. Bogle also claims that the Donaheys must accept a deed to the property.

A. The Land Contract

The land contract executed by Bogle and Richard Donahey is unambiguous and clearly states each party's rights and obligations. Under the land contract, Donahey was obligated to make monthly installment payments of $980.31 for ten years. Upon receiving all payments, defendant-Bogle was obligated to tender a 'good and sufficient' warranty deed free from all encumbrances, except those listed in the land contract. The land contract further provides that Richard Donahey was to pay all taxes and was to insure the building on the premises. The agreement bears Richard Donahey's acknowledgement that he examined the title commitment and was satisfied with the marketability of the property. The agreement also indicates that he "examined the . . . premises . . . ." The land contract provides at paragraph 2(g) that Bogle's retention of title to the

property operates as a security interest. The land contract also provides Bogle with two rights in the event of a default: (1) the right to forfeit the contract; and (2) the right to accelerate the balance owed and foreclose in equity. Michigan common law provides additional options.

Generally, if a land contract vendee defaults on contractual obligations, the vendor has various common law remedies available to her. As stated in *Gruskin* v. *Fisher*, 70 Mich. App. 117, 124-25 (1976), *rev'd on other grounds*, 405 Mich. 51 (1979),

> "[a] dozen remedies traditionally have been available, and some were or are still available in Michigan, to a vendor under a defaulted land contract. Those remedies include action for breach of contract, ejectment, eviction, foreclosure rescission, self-help, peaceful repossession, suit for purchase money, specific performance, summary proceedings and action to quiet title."

A land contract vendor also has the right to accelerate payments upon a breach or anticipatory breach of a land contract by a vendee. *Carpenter* v. *Smith*, 147 Mich. App. 560, 564-65 (1985). This common law right was not impaired or diminished in the land contract.

B. Legal Effect of Delivery of Quitclaim Deeds

It is well settled law that a grantor cannot convey an interest in realty without the assent of the grantee. *Gibson* v. *Diamond*, 281 Mich. 137 (1937). Bogle never accepted the deeds, and Richard Donahey knew that Bogle did not assent to delivery of the quit claim deeds. Bogle's refusal to assent to the transfer effectively blocked any conveyance of an interest in the property to her. As a result, Richard Donahey's actions did not

upset the status quo. The conveyance of quit claim deeds was a legal nullity.

C. Ownership of the Property

In determining legal ownership of the land, the Court must look to the position of the parties effectuated by the execution of the land contract alone — irrespective of Richard Donahey's attempt to convey his interest in the land by serving quit claim deeds on Bogle. In this regard, it is clear that Richard Donahey held an equitable interest in the property and that Bogle, as land contract vendor, held legal title as security for repayment of the purchase price.

According to Michigan law, a land contract vendor is not considered a "property owner," but rather is analogized to a mortgagee who holds title to property only to ensure payment of a debt. In *Gilford* v. *Watkins*, 342 Mich. 632 (1955), the Michigan Supreme Court held that a land contract vendor, such as Bogle, retains legal title only as security for the purchase price. After execution of the land contract, all other rights of ownership pass to the vendee. *Gilford*, 342 Mich. at 637. Under Michigan law, after she entered into the land contract, Bogle could not be considered the owner of the property.

Richard Donahey is the current owner of the property. Under the terms of the contract, Richard Donahey has the right of possession and the right to secure profits. As discussed below, under CERCLA, Bogle is not the owner of the property. Thus, by necessary implication, Richard Donahey, as the land contract vendee, and under the explicit provisions of the land contract, must be considered the current owner of the property.

D. Party in Breach

Richard Donahey contends that because he no longer held an interest in the property following service of the

quit claim deeds, he was no longer obligated to make monthly payments for which the parties contracted.[6] Bogle contends that because Richard Donahey failed to effectively convey his interest in the land to her, Richard Donahey's status as a vendee under the land contract continued, and she therefore remained entitled to payments in monthly installments, as specified in the land contract. Because the Court has determined that Richard Donahey's attempted conveyance was a legal nullity, Richard Donahey continues to have an interest in the property as a vendee and is obligated to make the agreed upon payments in monthly installments.

Thus, the Court concludes that Richard Donahey's refusal to perform according to the terms of the land contract — manifest in his refusal to make the monthly payments — constituted a breach of contract for which he is liable. Because Bogle rightfully accelerated payments due under the contract in response to Richard Donahey's breach of contract, Donahey must pay Bogle the entire outstanding debt.

Richard Donahey contends that Bogle's acceleration of the debt upon his refusal to make further payments constituted an attempt to initiate a forfeiture proceeding, which has the effect of returning full ownership rights to the party who initiated the forfeiture. As stated above, Bogle merely exercised her common law right to accelerate the payments due under the contract. She did not attempt to forfeit the contract and repossess the property or to foreclose in equity. Therefore, Donahey's argument fails.

E. Availability of Specific Performance

Bogle seeks specific performance. While a vendor seeking specific performance must tender a deed to the

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6 The perception that they were no longer obligated to perform under the terms of the land contract is evidenced by the correspondence sent by Donaheys' counsel to Bogle.

vendee, *Bradway* v. *Netzorq*, 298 Mich. 198 (1941), an anticipatory repudiation eliminates the need to tender the deed. *Robinson* v. *Grosse Pointe Shores Realty Co.*, 281 Mich. 184 (1937) (tender of deed is not a prerequisite to an action for specific performance when the vendee attempts to rescind the contract, attempts to recover payments made, and tenders a quitclaim deed). Under the doctrine of anticipatory breach, if a party to a contract, before performance is due, unequivocally declares his intent not to perform, the innocent party has the option to sue immediately for breach of contract or to wait until the time of performance to do so. *Jackson* v. *American Can Co., Inc.*, 485 F. Supp. 370 (W.D. Mich. 1980), *Brauer* v. *Hobbs*, 151 Mich. App. 769 (1986).

In July of 1987, Richard Donahey unequivocally expressed his intent not to make future payments to Bogle on the land contract. Nothing in the land contract allowed him to divert future payments to an escrow account. In this respect, Bogle was deprived of the benefit of the bargain. Donahey anticipatorily breached the land contract, which obviated Bogle's duty to tender a deed as a prerequisite to filing suit for specific performance. Accordingly, the Court finds that Bogle is entitled to specific performance of the valid land contract, and pursuant *Bradway* and *Robinson*, Richard Donahey must accept a deed to the property according to the terms of the contract.

Donahey argues that Bogle cannot deliver a deed in conformity with the provisions of the land contract. The land contract requires Bogle to deliver a warranty deed free of all encumbrances except for those listed in the contract. Richard Donahey argues that the environmental contamination and/or the consequent diminution of value of the property constitutes an encumbrance precluding delivery of an valid warranty deed.

An encumbrance is a burden upon title. *Simons* v. *Diamond Match Co.*, 159 Mich. 241, 247 (1909) (an encumbrance is "every right to or interest in the land granted, to the diminution of the value of the land . . ."), *Madhaven* v. *Sucher*, 105 Mich. App. 284 (1981). The mere diminution of value is not enough to constitute an encumbrance. Furthermore, environmental contamination does not affect title to the land and therefore cannot be considered an encumbrance. Thus, plaintiffs argument must fail. The Court holds that Bogle is able to convey title free of encumbrances as required under the land contract.[7]

II.

CERCLA CLAIMS

The following CERCLA claims for costs have been asserted: (1) the Donaheys' claims against all defendants for costs and contribution under 42 U.S.C. §§ 9607(a) and 9613(f)(1), and for declaratory relief under § 9613(g)(2); (2) Bogle's counterclaim against the Donaheys for response costs (i.e., attorney fees) under § 9607(a) and for contribution under § 9613(f); and (3) Bogle's crossclaims against St. Clair and Livingstone for contribution under § 9613(f). These claims share

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[7] By operation of law, the United States reserved the right to any uranium and thorium on the property. However, the claim has been statutorily released. 42 U.S.C. § 2098(b). As a result, plaintiffs cannot claim that the United States has an interest in the property that precludes delivery of a deed free from encumbrances.

Plaintiff also raised the issue of a lien against the property arising from the presence of hazardous wastes. Plaintiffs argued that a statutory lien arose by virtue of "any expenditures made by the State of Michigan from the hazardous waste service fund, such expenditures give rise to a lien against the property, and against Counter-Plaintiff as its owner, pursuant to M.C.L.A. 299.543." Plaintiffs Amended Reply to Defendants Counterclaim, at p. 7. Plaintiffs failed to substantiate such a claim at trial. In fact, plaintiffs failed to prove the existence of any encumbrance precluding tender of a good and sufficient warranty deed.

common legal and factual findings. Accordingly, the Court, below, organizes its analysis around the common issues presented by all the claims rather than around the particular claim asserted. Because all the rights to the property belong to the Donaheys, they are the owners of the property.

A. Ownership of the Property under CERCLA

As a threshold matter, it is necessary to determine the legal ownership of the property at issue. Under CERCLA, one holding indicia of ownership only to secure payment of a debt falls outside the § 9607(a)(1) definition of a current owner. 42 U.S.C. § 9601(20)(A)(iii), *United States* v. *Nicolet, Inc.*, 712 F. Supp. 1193, 1204-05 (E.D. Pa. 1989). In this case, as a land contract vendor — holding legal title under Michigan law only to secure a debt — Bogle is not a current owner under § 9607(a)(1). Accordingly, under both Michigan common law and CERCLA, Bogle is not the current owner of the property.

B. Statutory Background

CERCLA's liability provision has its genesis in Congress' desire to craft "a comprehensive response to the problems of hazardous waste," (*United States* v. *Bliss*, 667 F. Supp. 1298, 1304 (E.D. Mo. 1987)), and to provide "an array of mechanisms to combat the increasingly serious problem of hazardous substance releases." *United States* v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989) (quoting *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1078 (1st Cir. 1986)). One of CERCLA's general purposes is "to ensure, so far as possible, that the persons responsible for the creation of hazardous waste sites be liable for the response costs in cleaning them up." *United States* v. *Northeastern Pharmaceutical and Chemical Co., Inc.* ("*NEPACCO*"), 579 F. Supp. 823, 848

(W.D. Mo. 1984), *aff'd in part, rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). Congress wished to ensure "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions," S. Rep. No. 848, 96th Cong., 2d Sess. at 13, *reprinted in* 1 *Legis. Hist.* at 320, and that

> "society should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner, or operator who has profited or otherwise benefitted from commerce involving these substances and now wishes to be insulated from any continuing responsibilities from the present hazards to society that have been created."[8]

To this end, Congress designed a very broad reaching liability scheme under CERCLA.

C. Prima Facie Case for Recovery of Costs

To recover response costs under § 9607 of CERCLA, a private party must prove that (1) the defendant(s) falls within one or more of the categories of "covered persons" under § 9607(a)(1)(4); (2) a release or threatened release of hazardous substances occurred on the subject site; (3) the release or threatened release caused the party to incur costs; (4) such costs were necessary costs of response; and (5) the party's response actions were consistent with the national contingency plan ("NCP"). *Artesian Water Co.* v. *New Castle County*, 659 F. Supp. 1269, 1278-79 (D. Del. 1987), *aff'd* 851 F.2d 643 (3d Cir. 1988).[9]

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8 *Id., reprinted in* 1 *Legis. Hist.* at 98.

9 **All parties agree and it is clear from the facts that the property at issue contains hazardous substances as defined by CERCLA.**

Bogle claims that Donaheys' action is barred by the equitable doctrine of unclean hands and caveat emptor. Bogle also argues that Richard Donahey assumed the risk that hazardous materials had been released on the property. Furthermore, Bogle contends that she did not own the property when hazardous substances were disposed of there. All of the defendants argue that the costs incurred by the Donaheys were neither necessary nor consistent with the NCP.

1. Liability

Under CERCLA, the group of potentially responsible parties ("PRPs") represents a broad class. Liability under CERCLA is carefully prescribed in a statutory scheme found at 42 U.S.C. § 9607. Section 9607 states clearly the categories of PRPs, the circumstances under which they will be held liable for response costs, and the limited nature of defense available to defendants in cost recovery actions. The relevant statutory section provides:

> "Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person[,] who at the time of disposal of any hazardous substance[,] owned or operated any facility at which such hazardous substance were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity,

at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities or sites selected by such person, form [*sic*] which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

* * *

(B) any . . . necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release."

Essentially, liability under § 9607 extends to four classes of persons:[10] (1) the current owner or operator of a facility at which there is a release or threatened release of a hazardous substance; (2) the person who owned or operated the facility at the time of a hazardous substance disposal; (3) the persons who arranged for the treatment or disposal of a hazardous substance at the facility; and (4) the persons who transported hazardous substances to the facility. Section

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10 **Under § 9601(21), a "person" is "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a state, or any interstate body." All of the parties in this case — individuals and a corporation — are "persons" under CERCLA.**

9607 imposes strict liability — that is, without regard to fault — on a liable party. *J.V. Peters & Co.* v. *EPA*, 767 F.2d 263, 266 (6th Cir. 1985). Liability is joint and several when the environmental harm is indivisible and is proportionate when the harm is divisible. *United States* v. *Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989). Liable parties are given only limited statutory defenses. 42 U.S.C. § 9607(a), (b).

In this case, the harm to the property is indivisible. The land has been defiled by the parties' protracted and habitual waste disposal practices and neglect. It is defendants' contention that the Donaheys increased the volume of hazardous substances on the property by mixing non-hazardous materials with hazardous materials in the large lagoon, thus rendering the environmental harm to the property divisible according to pre- and post-Donahey site activities.

Contrary to the defendants' allegations, the Donaheys are not responsible for distinct aspects of the environmental harm to the property. The Court notes that the Donaheys did not exacerbate the condition of the land by translocating the wastes from the pits to the large lagoon — because all of the property, both surficially and subterraneously, was tainted by hazardous wastes (i.e., as mentioned above — toluene, xylene, styrene, phenol etc.). Thus, when the Donaheys mixed the surficial materials with the pit materials, they only combined substances that were already contaminated.

a) The Donaheys

As noted above, Richard Donahey is the current legal owner of the site. Therefore, under § 9607, Richard Donahey is Jointly and severally liable for all the costs of clean-up.[11]

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[11] **Patricia Donahey is not a current owner of the property, she deeded her interest in the property to Richard Donahey in 1988. As**

(*concluded on page A-38*)

b) St. Clair

Donaheys claim that St. Clair is liable for response costs under § 9607(a)(2) because it was an owner and operator of a facility at which hazardous substances were disposed, and under § 9607(a)(3) as a transporter.

St. Clair operated the site at the time waste were disposed of. It is clear that St. Clair had an ongoing policy of dumping barrels of hazardous waste products onto its industrial land as a method of waste disposal. It is also clear, considering the totality of the circumstances and all of the testimony adduced at trial, that St. Clair buried barrels and drums of hazardous waste products on the property. Under 9607(a)(2), St. Clair is jointly and severally liable as an owner or operator.

St. Clair is not liable as a transporter of hazardous substances. Under 9607(a)(3), a person must transport or arrange for the transport of hazardous substances to a facility owned by *another*. In this case, the evidence indicates that St. Clair only transported or arranged for transport to *self-owned* facilities; thus, St. Clair escapes liability under 9607(a)(3).

c) Livingstone

Donaheys next claim that Livingstone — as an operator at the time of disposal under § 9607(a)(2) and as an individual arranging for the transport of hazardous substances under § 9607(a)(3) — is liable for clean-up costs. The Donaheys' assertion of operator liability with respect to Livingstone does not rely on a theory of piercing the corporate veil; rather, the Donaheys maintain that Livingstone — despite his apparently limited

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(*continued from page A-37*)

an interim owner, Patricia Donahey does not come within the definition of a liable party under § 9607(a). Thus, of the Donaheys, only Richard is jointly and severally liable under CERCLA.

status as a shareholder — exercised direct control over the waste management activities of St. Clair, and that therefore he is directly liable as an operator.

Livingstone correctly argues that there is no evidence that he arranged for the disposal of hazardous substances as defined under 9607(a)(3). Livingstone also argues that his status alone as sole shareholder and officer/director of St. Clair does not confer liability for response costs under 9607(a)(2). The Court agrees.

A stockholder, director, or officer may be personally liable under § 9607(a)(2) of CERCLA in situations where it is shown that the individual personally participated in the wrongful conduct of the corporation. *State of New York* v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), *United States Conservation Chemical Co.*, 628 F. Supp. 391 (W.D. Mo. 1985).

In this case, there is no credible evidence that Livingstone personally participated in the waste disposal practices of St. Clair. No witness testified that Livingstone gave explicit or implicit instructions to dispose of wastes in a specific manner. The testimony at trial clearly indicated that Livingstone personally participated in only the financial aspects of St. Clair's operations, and that the day to day affairs, including waste disposal practices, were handled by managers and supervisors who did not need approval from Livingstone to execute their duties. While it is true that Livingstone had the authority to control waste disposal practices,[12] he never exercised such authority; it was

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12 **The Donaheys and Bogle argue that Livingstone is liable under the test articulated in *United States* v. *Thomas Solvent Co.*, 727 F. Supp. 1532 (W.D. Mich. 1989). In *Thomas*, the court fashioned a two part test for determining the personal liability of a corporate director under CERCLA: to hold a corporate officer personally liable under**

(concluded on page A-40)

delegated to others. Livingstone is not liable under § 9607(a)(2).

There is also no evidence that Livingstone personally arranged for the disposal of St. Clair's industrial waste products. Former St. Clair employees Nuss and Aldrich provided uncontroverted testimony that their participation as employees in St. Clair's waste disposal practices on the property was not under the direction of Livingstone. Both former employees testified that managers and supervisors directed their activities and that they had no reason to believe that Livingstone was involved at all. Thus, Livingstone is not liable under § 9607(a)(3) as a person who arranged for the treatment or disposal of St. Clair's waste materials.

d) Bogle

Donaheys also claim that Bogle is liable for their response costs because she allegedly owned the property when hazardous substances were disposed of. This claim against Bogle relies on 42 U.S.C. § 9607(a)(2), which provides that "any person who[,] at the time of disposal of any hazardous substances[,] owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for" response costs. Relying on a witness' (Joel Hunt) interpretation of aerial photographs, Bogle counters by arguing that the disposal of the hazardous waste and barrels in the under-

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(*continued from page A-39*)

CERCLA for the harmful waste disposal practices of the corporation, the court must find that (1) the corporate officer had the authority to direct waste disposal practices, and that (2) he either acted intentionally or negligently to produce the environmental harm. The *Thomas* test marks the broadest reading of the term "operator," but it reaches beyond the intent underlying CERCLA by imposing what amounts to a simple negligence standard that is not indicated in the statutory scheme, nor supported by the structure or history of CERCLA. Therefore, the Court rejects the *Thomas* test as excessively broad and ill-founded.

ground pits occurred before she acquired legal title to the property.

Clearly, Bogle owned the property when hazardous substances were disposed of on the property. Hunt's testimony regarding the creation of the underground pits was not credible. Based upon his reliance on the geological "law of superposition,"[13] Hunt testified that aerial photographs revealed that the underground pits were created prior to March or May of 1961. Bogle acquired title in August of 1961. Such testimony ignores important facts. For example, the known area of the underground pits — as revealed on aerial photos and as extracted from the testimony of Halfen and others — did not correspond with the area in which Hunt claimed the pits were created. Simply put, Hunt's opinion was not supported by a fair interpretation of the aerial photographs. Also, Bogle has ignored the testimony of Aldrich and Nuss to the effect that St. Clair dumped hazardous substances, and transported and abandoned barrels to the property throughout the 1970s. That fact alone would sustain a finding that Bogle is liable under § 9607(a)(2) as an owner at the time of disposal of hazardous substances. The Court concludes that Bogle did own the property when hazardous substances, including the material in the pits, were disposed of on the prop-

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13 **The Geologic Law of Superposition, as Hunt characterized it, provides that when natural or man-made deposits are layered, the most recent deposit constitutes the top layer — not an altogether remarkable concept.**

Hunt was asked on direct examination when the pits were created. Hunt testified that the aerial photo of the property, taken in 1961 before Bogle owned the property, showed "water or materials" layered above what Hunt referred to as the pit area, which Hunt claimed was under the water or materials. Based on this observation and the law of superposition, Hunt concluded that the pit area predated the photo. This conclusion assumes that the pits had already been created or layered prior to 1961. The conclusion, therefore, begs the question.

erty, therefore, Bogle is jointly and severally liable under § 9607(a)(2).

2. Defenses to Liability

a) The Donaheys

Richard Donahey argues that pursuant to § 9607(b)(3) of CERCLA, he is entitled to assert a "third party" defense. Section 9607(b) and (b)(3), taken together, state:

> [t]here shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by —
>
> (3) an act or omission of a third party other than . . . one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .

The Court is persuaded that Richard Donahey may not properly avail himself of the third party defense delineated in § 9607(b)(3). While it is true that a third party without any relevant contractual relationship with the Donaheys (i.e., St. Clair and/or Bogle) was directly

responsible for the release and/or threat of release of hazardous substances on the property, Richard Donahey's actions do not fall within the purview of § 9607(b)(3) because he did not exercise due care with respect to the hazardous wastes and did not take precautions against the consequences that could foreseeably result from the acts or omissions of the third party.

Richard Donahey did not use due care in the handling of the wastes on the property. He disrupted the settled wastes by transferring them to the large lagoon. By indicating that the property was insulated from the ground water by a 100 feet thick layer of clay, the E&E report belies his claim that there was a need to consolidate and "to stabilize," as Halfen claims, the wastes in the large lagoon. It is not persuasive that Halfen claims to have been ignorant of the E&E report when it was completed well before he executed his planned clean-up. Nonetheless, if Halfen was truly ignorant of the E&E report before executing the clean-up, then his effort (on behalf of Richard Donahey) certainly lacked the due care required under § 9607(b)(3). More broadly, Richard Donahey's failure to comply with the NCP and his failure to demonstrate the necessity of his activities on the property constitute a lack of due care under § 9607 (b)(3).

In addition to his lack of due care, Richard Donahey failed to take precautions against the consequences that could foreseeably result from the acts or omissions of the third party. With a heavy and dense concentration of hazardous wastes present, the property presented the potential for great harm to the ecosystem through leaching and run-off. Richard Donahey did nothing to guard against these possibilities. Instead, he consolidated all of the wastes in an above ground pile, thus

exposing the wastes to the local fauna and also creating an attractive nuisance. Aside from allowing environmental authorities to conduct some limited testing, Richard Donahey did nothing constructive to prevent further environmental harm or to guard against foreseeable consequences. Had Richard Donahey been concerned with the potential harm to the local area, he would have complied with MDNR requests to perform a hydrogeological evaluation and to dispose of roughly 125 drums (some with hardened rubber material) in accordance with the Michigan Solid Waste Management Act. In addition, had Richard Donahey been concerned with the consequences of the potential harm to the environment, he would not have abandoned the property after making a clearly futile attempt to quitclaim his interest to a knowingly unreceptive Bogle. Such conduct can hardly provide the basis for applying the third party defense under § 9607(b)(3).

In sum, after considering all relevant facts and circumstances, the Court holds that because Richard Donahey failed to use due care in his handling of the hazardous wastes on the property and failed to guard against foreseeable consequences, the third party defense under § 9607(b)(3) is not available to him.[14]

b) Bogle

Bogle also claims that the third party defense pursuant to § 9607(b)(3) absolves her of liability under § 9607(a). For reasons even more compelling than those applicable to Richard Donahey's assertion of a third party defense, Bogle's alleged third party defense must fail.

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14 The Donaheys second alleged defense is technically not a defense, but rather a factually based argument against liability. The Donaheys argue that because they were merely interim owners from 1982 to 1990 — they do not fall within the four classes of potentially liable parties in § 9607(a). As the Court has noted above, the Donaheys are the current owners of the property, therefore, the "interim owner" claim lacks merit.

Bogle did not use due care with respect to the hazardous wastes that were discharged onto the property. Under Bogle's lease agreements with St. Clair, she specifically reserved the right to inspect the property. She never did. Essentially, Bogle was an absentee landlord who failed to adequately monitor the use of the property, even after City of Marysville officials insisted that St. Clair stop its practice of incinerating organic wastes on the property. In addition, like the Donaheys, Bogle did not comply with MDNR requests to perform a hydrogeological survey and to remove barrels.

It is clear that Bogle failed to take precautions against St. Clair's waste disposal practices and failed to take precautions against the foreseeable consequences of St. Clair's actions.

In sum, because Bogle did not use due care and did not take precautions against the foreseeable consequences of St. Clair's actions, she cannot successful assert the third party defense under § 9607(b)(3).

Bogle has also asserted the defenses of unclean hands, caveat emptor, and assumption of risk. Her claims do not stand scrutiny. CERCLA's liability provision limits available defenses to only those stated in § 9607(b)(3) an act of God, an act of war, and a third party defense (or a combination of the three). Although the concepts of unclean hands, caveat emptor, and assumption of risk may be appropriate in apportioning liability under § 9613(g), they are not defenses to liability under CERCLA.

3. Release

A "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment." 42 U.S.C. § 9601(22). Nuss and Aldrich, former

St. Clair employees, testified that St. Clair's practice of dumping occurred as early as 1955 and occurred specifically at the subject property in the early 1970s. Furthermore, the expert testimony established that the hazardous materials at the property continue to leach into top soil. Thus, the Court concludes that a "release" occurred, and that a threat of release continues at the property.

4. Nature of the Response Costs

Both the Donaheys and Bogle claim that attorney fees associated with the response action and incurred in the prosecution of their private actions for contribution are recoverable "response costs" within the meaning of CERCLA. The Court disagrees.

The American Rule provides that each party bears the burden of its own legal costs, and that "absent explicit congressional authorization, attorney fees are not recoverable costs of litigation." *Runyan* v. *McCrary*, 427 U.S. 160, 185 (1976); *Accord Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975). Although CERCLA specifically allows the government to seek an award of attorney fees, a parallel statutory provision for private parties does not exist. The Sixth Circuit Court of Appeals has not addressed the issue of whether attorney fees incurred by a private party constitute recoverable response costs under CERCLA.

Many Courts faced with the issue have determined that in private cost recovery actions, attorney fees are not recoverable response costs. *T&E Industries, Inc.* v. *Safety Light Corp.*, 680 F. Supp. 696 (D. N.J. 1988); *Mesiti* v. *Microdot, Inc.*, 739 F. Supp. 57 (D. N.H. 1990), *Regan* v. *Cherry Corp.*, 706 F.Supp. 145 (D. R.I. 1989), *In re Hemingway Transport, Inc.*, 108 B.R. 378 (Bankr. D. Mass. 1989).

The Eighth Circuit Court of Appeals has held to the contrary. In *General Electric Co.* v. *Litton Business Sys-*

stems, Inc., 920 F.2d 1415 (8th Cir. 1990), the court interpreted the definition of "response" in 42 U.S.C. § 9601(25) to include attorney fees. *Accord Allied Towing Corp.* v. *Great Eastern Petroleum Corp.*, 642 F. Supp 1339, 1349 (E.D. Va. 1986). The court stated that because a "response" under § 9601(25) includes "enforcement" activities, recoverable response costs must include enforcement costs. The court went on to say that attorney fees incurred in the prosecution of a private action are enforcement costs, and are therefore recoverable response costs.[15]

Litton is not persuasive. The court did not explain how its interpretation of § 9601(25) harmonized with the longstanding American Rule regarding recovery of attorney fees. This omission is particularly important when one considers the resulting internal incongruity of CERCLA, providing explicit and unequivocal language allowing the government to seek attorney fees under § 9604(b)(1), but providing only a circumscribed textual basis, as stated in Litton, for granting the same right to private parties.[16] What is more, the holding in *Litton* does not consider Congress' failure to include a provision for recovery of attorney fees by private party litigants in the comprehensive amendments to CERCLA passed in 1986. *See Regan* v. *Cherry Corp.*, 706 F. Supp. 145, 149 (D. R.I. 1989).

Litton presents other problems as well. If attorney fees are response costs, then to recover such costs under § 9607, a party must establish that such expenditures

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15 CERCLA does not define "enforcement activities."

16 The inclusion of a section specifically addressing the government's ability to recover attorney fees strongly suggests that Congress was well aware of the need — given the *Runyan* and *Alyeska* rationales — to unequivocally declare a party's right to recover attorney fees under CERCLA, which they did not do for private party litigants.

were consistent with the NCP, which is silent with respect to the criteria a court would employ in determining the legitimacy of attorney fees. Once again, to consider attorney fees recoverable response costs strains the statutory and regulatory language and design. This Court declines to give CERCLA such an interpretation.

While the Court is well aware of the Judicial tendency to interpret CERCLA expansively in the hope of effecting its remedial goals, it nonetheless believes that such an ambitious effort with respect to the issue of attorney fees would be disingenuous and would denigrate settled rules of statutory interpretation and the integrity of the statutory scheme. The Court declines to invigorate the *Litton* court's achievement of an expansion of — rather than an interpretation of — the term "response."

Based upon the well-settled American presumption against allowing recovery of attorney fees, and based upon the lack of explicit congressional authorization for recovery of attorney fees in the statute, the Court concludes that attorney fees in private actions are not recoverable "response costs" under CERCLA. Accordingly, Donaheys' request to recover $279,366.80 in attorney fees as response costs, as a matter of law, fails. Bogle's claim for attorney fees suffers the same legal defect.

As a factual matter, Donaheys' request for attorney fees also fails. Donaheys' complaint included ten claims or theories of recovery, only one of which invoked CERCLA. After hearing a motion for summary judgment, the Honorable James Harvey, to whom this case was originally assigned, dismissed nine of the ten claims in the Donaheys' complaint, leaving only the CERCLA claim for trial. At trial, Donaheys submitted summaries of the attorney billings and the original billings, both of which failed to specify the exact type of service performed.

The proofs failed to indicate whether the attorney fees were expended in defense of the CERCLA claim or the other federal statutory and state common law claims that were dismissed. The proofs did not indicate if the attorney fees were incurred in receiving counselling, prosecuting and/or defending the CERCLA claim, defending the other claims, or preparing for trial. Because the Donaheys did not itemize the various attorney fees incurred over time, the Court is unable to determine the exact amount incurred in the prosecution and defense of their CERCLA claim, in receiving counselling on compliance with CERCLA, and in orchestrating the legalities involved in the actual response effort. At best, then, as a factual matter, Donaheys' claim for attorney fees is speculative.[17]

5. Compliance with the NCP

Defendants contend that the response costs incurred by the Donaheys — namely the costs associated with plaintiffs' efforts in August of 1987 — were neither necessary nor consistent with the NCP. The NCP can be found at 40 C.F.R. 300.61 *et seq.* The NCP is a compila-

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17 In their post-trial proposed findings of fact and conclusions of law, plaintiffs have requested a supplemental hearing following a determination of liability, at which time they plan to supplement their proofs on damages. Although in form plaintiffs have indicated that they do not want a bifurcated trial, in substance it is exactly what they are requesting. Plaintiffs request was denied at trial because, *inter alia*, one element of plaintiffs' prima facie case is a detailed presentation of the type, propriety, and necessity of response actions taken, thus, no finding of liability could be made in the absence of sufficient proof of damages. The Court hereby affirms its prior ruling at trial denying plaintiffs' request for a bifurcated trial.

In addition to the attorney fees and the costs associated with Halfen's activities, plaintiffs also seek to recover approximately $20,000.00 expended for the services of "consultants." Plaintiffs have not produced any evidence to support recovery for such consultant fees.

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tion of rules and regulations designed to implement the federal government's general plan or framework for guiding and managing responses to hazardous substance releases. Although the NCP was not intended to provide complex and detailed decision making criteria, 50 Fed. Reg. 47920 (Nov. 20, 1985) (preamble to NCP), it does contain guidance for private response actions. 40 C.F.R. 300.61(e)(2). The NCP incorporates all applicable federal, state, and local environmental regulations. 40 C.F.R. § 300.71(a)(4), including sections of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, concerning treatment of hazardous wastes. For the reasons stated below, the Court concludes that Donaheys' August, 1987 actions were inconsistent with the NCP and, therefore, are not recoverable under CERCLA.

Based on the testimony of plaintiffs' expert, Lawrence Halfen, the Court concludes that the hazardous substances discovered at the property are "hazardous wastes" within the meaning of RCRA, 42 U.S.C. § 6903(5), thereby causing RCRA regulations to be incorporated into the NCP and to be applied in this case. Section 6903(5) defines a hazardous waste as a compound that may cause death or serious permanent illness, or pose a health risk when improperly stored. EPA regulations further define hazardous wastes at 40 C.F.R. § 261.31. Benzene, toluene, and xylene are variously defined under § 261.31 as "F" series hazardous wastes. It is undisputed that these chemicals were used in St. Clair's rubber manufacturing processes throughout the period in question and that they were utilized in churn-washing procedures at St. Clair. Furthermore, Halfen's testimony clearly establishes that he detected these compounds surficially and subterraneously in appreciable concentrations, leading him to the conclusion that his intended clean-up effort would be inadequate and that instead,

he would need to prepare a plan to clean-up "hazardous wastes." Indeed, Halfen's testimony was rife with references to "hazardous wastes." Accordingly, because hazardous wastes were known to exist on the property, RCRA regulations regarding the treatment of hazardous wastes are applicable to this case via incorporation into the NCP.[15 [*sic*. 18]]

Plaintiffs' clean-up effort did not comply with RCRA regulations. A party handling or processing hazardous wastes must obtain a RCRA permit. 40 C.F.R. § 270.1(c)(1)(ii). Plaintiffs failed to meet the permit requirement under § 270 when they allowed their agent, Halfen, to excavate the pits and consolidate the hazardous wastes into the large lagoon. Treatment and storage of hazardous wastes must be preceded by a detailed physical and chemical analysis of a representative sample. 40 C.F.R. § 264.13. Although plaintiffs' agent, Halfen, knew he was handling hazardous materials, he did not obtain the requisite analyses mandated by § 264.13. An owner or operator of a facility must secure the site against unknowing and unauthorized entry by persons and/or livestock. 40 C.F.R. § 265.14. A 24 hour surveillance system, or a fence in good repair combined with a means to control entry, constitute the two permissible

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15 [*sic*. 18] Plaintiffs have maintained, independent of the testimony of Halfen, that the property contained hazardous wastes. At paragraph 48 of plaintiffs' complaint, plaintiffs state that "[s]ome of the hazardous and dangerous substances released from the Wills Street site into the soils, and ground and surface waters are 'hazardous wastes' as defined in 42 U.S.C. Sec. 6903(5)." In their brief in support of their motion to reinstate Count XI of the complaint, dated November 27, 1990, at pp 8-9, plaintiffs claimed that

> **"[s]upporting Plaintiffs' rescission argument is a record demonstrating that neither contracting party had any knowledge of the presence of a separate area on the property containing hazardous waste contamination . . . . Plaintiffs obviously did not enter into this contract with the intent to purchase a piece of property contaminated by hazardous waste pits."**

methods of satisfying § 265.14. Plaintiffs' did neither. Plaintiffs' placement of a wood-slat snow fence around the consolidated pile in the large lagoon does not present any real barrier to intrusion at the property. The snow fence, even in perfect condition, could be overcome with minimal effort.[16 [*sic*, 19]] Hazardous wastes cannot be stored for more than 90 days without obtaining a permit or a permit waiver. 40 C.F.R. § 262.34. Plaintiffs never received a permit or a permit waiver for their storage of hazardous wastes on the property, storage that now approximates four years.

Based on all of the foregoing, it is clear that hazardous wastes are present on the property and that plaintiffs have not acted in compliance with RCRA, and hence the NCP.

Plaintiffs' actions violated other NCP provisions, separate and independent from the violation of regulations incorporated into the NCP. The NCP favors actions "necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances" and the taking of "other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or the environment which may otherwise result from such release or threat of release." 40 C.F.R. 300.64. The NCP includes a list of removal actions that are appropriate in certain circumstances and that are relevant to this case:

> (1) providing fences, warning signs, or other security or site control precautions — where humans or animals have access to the release;

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16 [*sic*, 19] Photographs of the snow fence show it in a dilapidated condition.

(2) constructing drainage controls (e.g., run-off or run-on diversions) — where precipitation or run-off from other sources (e.g., flooding) may enter the release area from other areas;

(3) stabilization of berms, dikes, or impoundments — where needed to maintain the integrity of the structure;

(4) capping of contaminated soils or sludges-where needed to reduce migration of hazardous substances or pollutants or contaminants into soil, ground water, or air;

(5) removal of contaminated soils from areas — where such removal reduces the spread of contamination;

(6) removal of barrels and drums that contain or may contain hazardous substances, pollutants, or contaminants — where it will reduce the likelihood of spillage, leakage, exposure to humans, animals, or food chain, or fire or explosion.

Plaintiffs actions did not substantially comply with the NCP requirements listed above. Plaintiffs actions, through their agent Halfen, made a bad situation worse. Plaintiffs dismantled a wire fence that surrounded the pit area, facilitating rather than impeding access to the site. After consolidation of the hazardous wastes in the large lagoon, plaintiffs erected a snow fence that provided no real barrier to entry. Plaintiffs placed "hazardous waste" stickers on the snow fence. The paper stickers have since disintegrated. Plaintiffs provided no drainage control. Stabilization of the large lagoon was only necessitated by plaintiffs' consolidation of wastes in the lagoon. According to Halfen's own calculations

(see exhibit 65-B), the consolidation of the wastes in the large lagoon increased the surface area of wastes exposed to top soil by 50%.[17 [*sic*, 20]] The mollifying effect of covering the waste pile with a tarp and top soil is negated by the greater access to the wastes above ground as opposed to below ground in the pits. Thus, in addition to enhancing the possibility of migration into soil, the mounding of the wastes eased access and increased the chances of contact with the hazardous wastes. Also, by translocating the wastes from the pits to the large lagoon, plaintiffs spread the contamination to a relatively untainted portion of the property. Considering the fact that plaintiffs removed very little hazardous materials from the property, and that plaintiffs, according to their own admissions, knew little about the exact characteristics of the materials they were dealing with, it is impossible to say that plaintiffs' actions facilitated the goals underlying CERCLA or in any way improved the condition of the defiled property. Plaintiffs' actions on the property in August of 1987 did not comply, strictly or substantially, with the NCP. Thus, the costs incurred by plaintiff for their August 1987 activities are not recoverable under CERCLA.

Halfen testified at trial that his actions were meant to reduce the presence of an attractive nuisance on the property. Apparently it was plaintiffs' contention that underground, invisible pits — with approximately seven square feet modestly exposed in a tire track made by a backhoe weighing thousands of pounds — posed an attractive nuisance, more so than the conspicuous 1600 cubic yards of wastes piled into the large lagoon and surrounded by a three foot snow

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17 [*sic*, 20] According to Halfen's measurements in exhibit 65-B, the total surface area of the pits was approximately 2700 square feet, the total surface area of the large lagoon after consolidation was approximately 4000 square feet.

fence bearing warning stickers. Common sense belies plaintiffs' contention.

Halfen also testified that consolidation of the wastes was necessary to reduce or minimize the threat of fire allegedly created by the exposure of the flammable solvents in the pits. Halfen did not detect solvent odor emanating from the pit area until he probed the area with a long metal rod. There was no evidence that the mere discovery of solvents underground created a risk of fire. In fact, the excavating action of the backhoe released solvents into the air, agitated and disturbed the settled state of the wastes, and caused the backhoe to directly contact the wastes (increasing the likelihood that the mechanics of the backhoe or the collision of metal barrels with the backhoe would create sparks). Halfen's actions increased the risk of fire by releasing vapors, concentrating the flammable materials in one place, and bringing the backhoe into close proximity to the flammable materials.

It is also difficult to understand exactly what made plaintiffs' actions "necessary." Halfen identified the location of the pits and could have measured the volume of the pits without excavating them. He also could have taken samples without performing a wholesale excavation of the pits. What is more, the Court does not understand how anyone could take constructive action absent a reliable analytical characterization of the materials in the pits.

The Court holds that Halfen's actions over the course of six days in August of 1987, and performed upon plaintiffs' request, were neither necessary nor consistent with the NCP. Accordingly, the Court finds that plaintiffs have failed to prove an essential element of their cause of action.

D. [*sic*, 6.] Declaratory Relief under §9613(g)(2) for Future Liability

In their complaint, the Donaheys seek declaratory relief regarding liability for future response costs incurred. The Court holds that such relief is not available when the party seeking declaratory relief has failed to incur recoverable response costs. *See Southland Corp.* v. *Ashland Oil, Inc.*, 696 F. Supp. 994, 999, 1003 (D. N.J. 1988), *O'Neil* v. *Picillo*, 682 F. Supp. 706, 730 (D. R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir 1989). Because the plaintiffs have not incurred recoverable response costs, declaratory relief is not available.

CONCLUSION[18 [*sic*, 21]]

With respect to the land contract issues in this case, the Court finds that (1) the Donaheys breached the land contract by, *inter alia*, failing to make installment payments; and (2) Helen Bogle is entitled to specific performance of the land contract, and the Donaheys must accept a deed to the land.

The notion of an absentee landlord, the externalization of production costs, the demonstrated human tendency to conceal environmental defects and to evade liability — separately and collectively — provided the impetus for the passage of an austere statute like CERCLA, which in this case, has produced the following results: for all the reasons stated above, the Court holds that (1) all parties, save Seabourn S. Livingstone, are Jointly and severally liable under CERCLA for the environmental contamination located in the large lagoon area of the property located at 2408 Wills; (2) the alleged response costs incurred by Bogle and

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18 [*sic*, 21] The "conclusion" shall not be construed to limit or modify the specific findings of fact and conclusions of law contained in the body of this opinion.

the Donaheys are not recoverable under CERCLA; (3) declaratory relief is not available in this case; (4) the Donaheys are the current owners of the property at 2408 Wills, and Helen Bogle holds legal title merely to secure Donaheys' indebtedness.

The parties are hereby ORDERED to submit a joint proposed judgment not inconsistent with this opinion by October 11, 1991.

IT IS SO ORDERED.

/s/ LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

(Certification Omitted)

SUBCHAPTER I — HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

* * *

§ 9601. Definitions

For purpose of this subchapter —

* * *

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

* * *

(23) The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary[2] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to

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[*Printer's Note*]: Footnote omitted in this reproduction.

prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.].

(24) The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation,

storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms "respond" or "response" means remove, removal, remedy, and remedial acton, all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

* * *

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or

treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or lost resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on

which interest accruing under this subsection commences.

* * *

§ 9613. Civil proceedings

* * *

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

* * *

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

MEMORANDUM OPINION AND ORDER

(United States District Court —
Western District of Michigan — Southern Division)

(Filed April 24, 1993)

(FRANK J. KELLEY, Attorney General of the State of Michigan, ex rel. MICHIGAN NATURAL RESOURCES COMMISSION, MICHIGAN WATER RESOURCES COMMISSION, and DAVID F. HALES, Director of the Michigan Department of Natural Resources, Plaintiffs, v. LESTER TISCORNIA, JAMES W. TISCORNIA, EDWARD C. TISCORNIA, LOREN GERBER, Defendants, and MANUFACTURERS NATIONAL BANK OF DETROIT, Defendant and Third-Party Plaintiff, v. UNITED STATES OF AMERICA, Third-Party Defendant — Case No. 5:90-CV-62; HON. DAVID W. McKEAGUE)

The action is brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et *seq.*, and the Michigan Environmental Response Act ("MERA"), M.C.L.A. 299.601 *et seq.* The plaintiffs are seeking compensation for expenses incurred cleaning up two sites: the Auto Specialties Manufacturing Company ("AUSCO") facility located in St. Joseph, Michigan (the "St. Joseph Facility") and the facility located in Benton Harbor, Michigan (the "Riverside Facility"). Counts I and II of the Second Amended Complaint seek relief under CERCLA and allege that the Tiscornias owned or operated the sites during times when hazardous substances were released. Counts III and IV seek relief under MERA and allege that the Tiscornias owned or operated the sites at the time of disposal of a hazardous substance.[1]

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[1] **Because the provisions set forth in MERA were modeled after CERCLA, the analysis as to MERA liability is coextensive. The**

(*concluded on page A-64*)

This matter is before the Court on cross-motions for summary judgment. Plaintiffs move for partial summary judgment as to the liability of defendants Edward, Lester and James Tiscornia ("the Tiscornia defendants").[2] The Tiscornias also move for summary judgment. The Court has reviewed the pleadings and exhibits, heard oral argument, and finds the matter ready for disposition.

FACTS

Lester, James and Edward Tiscornia held all of the voting stock of AUSCO, a closely-held corporation. Lester held 83%. James and Edward held the balance, although the precise division between the two is unclear from the pleadings. Each of the Tiscornias was also a member of the Board of Directors and an officer of the corporation. Since 1977, each of the Tiscornia defendants served as a member of the AUSCO Executive Committee. The committee, comprised of four individuals, made decisions for the corporation. Under the corporate by-laws, the Executive Committee exercised "the powers of the Board of Directors in the management of the business affairs and property of the corporation." The Executive Committee acted and the Board then approved the Executive Committee minutes or actions.

Minutes from the meetings of the Executive Committee show that the members reviewed and discussed the Notice of Violations that AUSCO facilities received

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(*continued from page A-63*)

Michigan courts have authorized this approach. "Where a statute is adopted from another jurisdiction, it is presumed that the Legislature intended that the statute be construed in accordance with the judicial construction given by such other jurisdiction." *Greek* v. *Bassett*, 112 Mich. App. 556, 564 (1982).

2 The case has been bifurcated and at this time only liability issues are before the Court.

from the Environmental Protection Agency ("EPA") and the Michigan Department of Resources ("MDNR").[3] In 1979, three different letters were sent to AUSCO indicating that the Company's landfill operations were not in compliance with state regulations. Each letter sent from the MDNR was routed to the Executive Committee through an internal AUSCO memo. The Committee reviewed the memorandum and made arrangements to locate an attorney with whom to consult regarding environmental issues. According to the defendants, the Executive Committee merely set policy and ensured that people were in place to comply with the established policy. The decisions on specific waste disposal practices were made by employees hired for the purpose of handling these responsibilities.

In turning to each Tiscornia individually, it is undisputed that Lester Tiscornia became a director of the Company in 1951, Executive Vice President of Manufacturing in 1961, and President and Chairman of the Board in 1964. According to the defendants, Lester served in an executive capacity and never directed the actual operation of the Company. Lester Tiscornia testified in deposition that his knowledge of environmental matters was limited to information presented in Executive Committee meetings. He semiretired in 1975, although he continued to serve on the Executive Committee.

After Lester became less active in AUSCO, James Tiscornia acted as Chief Operations Officer until 1986. In this capacity, he oversaw four plants, including the two which are the subject of this action. Plant managers

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3 **Exhibit 436 contains the minutes of a meeting held 11-20-78, see paragraph 7; exhibit 437 contains the minutes of a meeting held 11-27-78 and mentions a Riverside Consent Order, EPA notice of violations and the St. Joseph Water Discharge Permit-Non-Compliance Notice. Similar matters are included in the minutes contained in Exhibits 439 and 441.**

were in place at each site, however, as were employees responsible for environmental concerns. According to the organizational chart, three levels of supervision separated James Tiscornia from the environmental employees.

Edward Tiscornia served as Division Manager of St. Joseph and Manager of the Castings Division during the 1970s. He reported directly to the Plant Manager. In 1979, Edward moved into sales and remained sales manager until 1986.

In the late 1970s and early 1980s, during the Tiscornias' tenure, baghouse dust was disposed in the landfill. The results of a leachate test performed in 1981 on baghouse collector dust samples of wastes from St. Joseph and Riverside indicate that some samples exceeded drinking water standards for cadmium and lead.

STANDARD OF REVIEW

Summary judgment is appropriate where no genuine issue of material fact exists so that the movant is entitled to judgment as a matter of law. Fed. R. Cir. P. 56(c). The court determines whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Of course, "inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (quoting *United States* v. *Rievold, Inc.*, 369 U.S. 654, 655 (1962)). The movant meets its initial burden "by showing — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.* v. *Catrettt*, 477 U.S. 317, 324-25 (1986). At

that point, the nonmovant "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(c).

ANALYSIS

CERCLA liability attaches if all of the following elements are established:

(1) There is a release or threatened release of a hazardous substance;

(2) at a facility

(3) causing the plaintiff to incur response costs; and

(4) the defendant is a responsible party as defined in § 107(a).

42 U.S.C. § 9607(a). *United States* v. *Aceta Agricultural & Chemical Corp.*, 872 F.2d 1373 (8th Cir. 1989). Liability is strict, and fault or state of mind is irrelevant. *United States* v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988). Because the goals of CERCLA are remedial, the Court is obligated to construe the statute's liability provision broadly to avoid frustrating its legislative purpose. *Anspec Co., Inc.* v. *Johnson Controls*, 922 F.2d 1240, 1247 (6th Cir. 1991).

I

In this motion, the Court must decide two issues, whether there was a release or threatened release of a hazardous substance, and whether the defendants are responsible parties.[4] In turning to the first element, the statue merely requires that there be a release or threatened release of a "hazardous substance" from the site. A hazardous substance includes substances designated

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[4] **The parties do not dispute that AUSCO qualified as a facility or that the plaintiffs incurred response costs.**

as hazardous or toxic in specified environmental statutes or by the EPA pursuant to CERCLA § 102, 42 U.S.C. § 9602, and is defined as:

> (A) any substance designated pursuant to section 132(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921], [also known as the Resource Conservation and Recover Act ("RCRA")] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901, *et seq.*] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clear Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15 . . .

42 U.S.C. § 9601(14).[5] Counsel for the Tiscornias conceded in oral argument that baghouse dust is a hazardous waste as that term is defined by RCRA.[6] Further,

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5 The definition of "hazardous substance" under MERA includes not only those substances deemed hazardous under CERCLA, but also hazardous waste as defined under the Michigan Hazardous Waste Management Act ("HWMA"), 1970 P.A. 64, as amended, M.C.L.A. § 299.501 *et seq.*, and "petroleum." See M.C.L.A. § 299.603(p).

6 James Tiscornia admitted that foundry sand, metal shavings, dried paint residues, spent paint solvents, used oils, baghouse dust, general plant refuse and asbestos brake linings were deposited in the landfills (interrogatory #8), however, the parties did not discuss whether these additional substances meet the definition of hazardous under the Act.

it is undisputed that baghouse dust was deposited in the landfills until 1981. Nevertheless, each of the Tiscornia defendants contends that no landfill disposal of any hazardous substance occurred during his tenure on the Executive Committee.[7] This assertion is apparently based upon their argument that at the time the disposal occurred, the substances disposed-of were not deemed hazardous.

CERCLA not only places liability on parties for antecedent acts, but also attaches new legal significance to them. The statute does not recognize compliance with state regulations as a valid defense. *B.F. Goodrich Co.* v. *Murtha*, 754 F. Supp. 960, 972 (D. Conn. 1991). Under § 9607(b), the only defenses are "acts of God, acts of war, [sic] and acts or omissions of third parties." *J.V. Peters & Co., Inc.* v. *Administrator, Environmental Protection Agency*, 767 F.2d 263 (6th Cir. 1985). Consequently, the defendants' contention that they acted responsibly and complied with all laws does not immunize them from liability. See, *United States* v. *Dickerson*, 640 F. Supp. 448, 451 (D. Md. 1986).

Accordingly, the defendants having admitted that the substances deposited in the landfill meet the definition of hazardous waste under RCRA, the Court finds that the plaintiffs have met their burden under the statute to show that a release or threatened release occurred at an AUSCO site.

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7 The timing of the release is no consequence to the Court's analysis under the first element. In fact, the timing becomes pertinent when analyzing the second disputed element, whether any one of the Tiscornias was a responsible party. To find that a person is a responsible party, he must have owned or operated a facility *at the time of the disposal*. 42 U.S.C. § 9607(a)(2). Because the parties incorporated the timing of the disposal into their argument as to whether a release occurred, the Court, as a matter of convenience, likewise notes it here.

II

The Court now turns to the second element in dispute, whether each of the Tiscornias is a responsible party. Under 42 U.S.C. § 9607(a)(2) a responsible party is defined as:

> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, . . .

Further, under the Act an owner or operator is defined as "any person" and any person is defined as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(20)(A) and (21). The list makes no mention of corporate officers.

The plaintiffs allege in their motion that the Tiscornia defendants nevertheless are operators, and therefore responsible parties under CERCLA based upon their control over AUSCO. Because corporate officers are not listed as persons under the statute, the Court has reviewed three sources of authority to discover the basis upon which liability might be imposed upon a corporate officer: Sixth Circuit caselaw interpreting the CERCLA statute, Michigan corporate law, and various tests adopted in other circuits. Each is discussed below.

A. Sixth Circuit Caselaw

The Sixth Circuit addressed the issue of the liability of corporate officers in *Donahey* v. *Bogle*, 1993 W.L. 59296 (6th Cir.), wherein it reversed the finding of the district court that defendant Livingstone, the sole shareholder and director of defendant corporation St. Clair Company, was not liable for cleanup costs under

CERCLA. The district court found that although Livingstone had the authority to control disposal practices, there was no testimony to indicate that Livingstone personally participated in waste disposal practices.

The Sixth Circuit opinion succinctly stated that the trial court erred in:

> concluding that Seabourne Livingstone was not liable as an *owner* under CERCLA. The evidence clearly established that Livingstone had the authority to prevent the contamination of the property by his corporation; thus, as a matter of law, Livingstone was a responsible party. *Kelley* v. *Thomas Solvent Co.*, 727 F. Supp. 1532 (W.D. *Mich. 1989); New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1043 (2d Cir. 1985); *U.S.* v. *Ward*, 618 F. Supp 884 (E.D. N.C. 1985); and *U.S.* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986). (Emphasis added).

Apparently, the dispositive factor in holding Livingstone liable as an owner was his status as sole shareholder and director of the corporation. To find *Donahey* controlling in this case, the Court would have to merge the three Tiscornia defendants into a single person and ignore the existence of other shareholders. Lester, James and Edward Tiscornia shared little beyond the same last name with respect to their corporate responsibilities. They each had a job to do and there has been no showing that any one of them performed his responsibilities only with the consensus of the others. Accordingly, the Court must examine the liability of these defendants based on their status as "operators."

Although the complaint alleged that the Tiscornias were owners or operators, the motions before the Court are apparently brought on the theory that, as a matter of law, the Tiscornias were operators. Because this

Court is unable to discern any additional guidance from the holding in *Donahey*,[8] the Court gleans a framework in which to approach the issue of corporate officer liability based on operator status from the analysis in *Anspec Co.* v. *Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991). In *Anspec*, the court held that corporate successor liability existed under CERCLA because when Congress included the term corporation in the definition of persons who may be held liable under CERCLA, it intended that the term be given its universally accepted meaning.

The court reasoned that § 9607(a) was "textually incomplete" because it failed to specify that a reference to liability of corporations included successor corporations. *Id.*, at 1246. This interpretation of the statute merely recognized a universally accepted rule of law, the doctrine of successor corporate liability. Consequently, successor corporations were included.[9]

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8 The cases cited by the court stand for differing principles. In *Thomas Solvent*, the court acknowledged that the standard it adopted was "unlike the lack of corporate formalities associated with piercing the corporate veil, and . . . different from the issue of personal knowledge, direct supervision, or active participation found in most ordinary torts by corporate actors." *Id.* at 1544. Thus, liability turned on the actor's ability to prevent the discharge. Under *Shore Realty*, the liability turned on the actor's own participation *and* involvement in the discharge. *Ward* addressed the liability of an actor who "arranged for disposal" pursuant to § 107(a)(3), and the facts established he was personally involved. *Id.* at 896. Finally, *Northeastern Pharmaceutical* involved a corporate actor's liability as a generator under the Reserve Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 690 et seq. RCRA regulates the storage, handling and disposition of hazardous wastes. *Id.* at 726. The court's citation to these incongruous line of cases provides no thread of reasoning through which this Court is able to discern the standard by which a corporate officer is liable. under CERCLA as an operator.

9 See, also, *CPC Intern., Inc.* v. *Aerojet-General Corp.*, 777 F. Supp. 549, 573 (W.D. Mich. 1991), a case wherein the court concluded that CERCLA broadens "the potential for liability of parent corporations

(*concluded on page A-73*)

In reaching this conclusion, the Sixth Circuit also relied on the general rules of construction of the United States Code, and the legislative purpose of the Act. Specifically, 1 U.S.C. § 5 (1990), provides that the words "company" or "association" used in reference to a corporation include successors or assigns. An association is included in the list of business entities enumerated as potentially responsible parties ("PRPs") under CERCLA. Thus, successor corporations might be liable under CERCLA. The Sixth Circuit determined that the law of the state of incorporation would be applied to determine actual corporate successor liability under CERCLA. *Id.* at 1248.[10]

From a policy standpoint, the court's finding of successor liability was harmonious with the legislative purpose of CERCLA to provide "the federal government with the tools immediately necessary for a swift and effec-

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(*continued from page A-72*)

without discarding entirely the traditional concept of limited liability that is central to corporate law. By expressly including as liable parties those that have 'operated' facilities, Congress unmistakably expanded the reach of CERCLA beyond the limited realm of those who have 'owned sites'." But the statute and its legislative history do not suggest that CERCLA rejects entirely the crucial limits to liability that are inherent to corporate law. The court concluded that CERCLA's owned or operated language demands that a parent must have actually operated the business of a subsidiary, and that mere oversight of the business in a manner appropriate and consistent with the investment relationship is not enough.

10 This Court also reviewed *United States* v. *Production Plated Plastics, Inc.*, 742 F. Supp. 956 (W.D. Mich. 1990), *aff'd* 955 F.2d 45 (1991), wherein the court held that corporate officer liability under the Resource Conservation & Recovery Act ("RCRA"), 42 U.S.C. § 6973(a), could be established if the officer "actually made corporate decisions." The language of the statute authorizes this outcome. 42 U.S.C. § 6973(a) provides for the imposition of liability against "any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) . . . provided that person has contributed or "is contributing to such handling, storage, treatment . . ."

tive response to hazardous waste sites" and "that those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created." *Anspec*, at 1247.

Although the general rules of construction offer no guidance with regard to corporate officer liability, the Court finds that corporate officers, like successor corporations, may nevertheless be liable under CERCLA. In reaching this conclusion, the Court finds that holding accountable those persons, including corporate officers, responsible for creating the harm, is consistent with both the purpose for which Congress enacted CERCLA, and cases interpreting CERCLA by the Sixth Circuit. Corporate officer liability, like corporate successor liability, is a long-standing and universal doctrine of law which is not to be ignored. Hence, the statute is construed in light of "universally accepted principles of private corporation law." Anspec, at 1245. Accordingly, the Court next addresses the applicability of the law of the state of incorporation.

B. Michigan Corporate Law

In turning to state corporate law, the Court notes that one well-established basis for imposing liability on a corporate officer is his participation in tortious or criminal acts whether on his own behalf or on behalf of the corporation. *Kelley* v. *Ankersen*, 148 Mich. App. 524, 557 (1986) (citations omitted).[11]

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[11] **Michigan law also provides a second basis upon which corporate officer and, consequently, CERCLA liability may be based. Under Michigan law, piercing the corporate veil is an equitable doctrine applied to prevent fraud, illegality or injustice, and may be used to impose liability on a corporate officer. *Schusterman* v. *Employment Security Comm'n.*, 336 Mich. 246 (1953); *Soloman* v. *Western Hill Der. Co.*, 110 Mich. App. 257 (1981). This doctrine is not applicable to the facts of this case and neither party has advocated this doctrine as a means by which the Court could determine the existence of liability.**

The plaintiffs argue that to impose liability, Michigan law requires only that a corporate officer had knowledge of the existence or continuance of a nuisance created or maintained by the corporation or should have known through the exercise of ordinary diligence. *Kelley* v. *Acme Disposal*, 189 Mich. App. 722, 726 (1991). In *Acme Disposal*, the court found that a party with the power to control corporate activities due to his position or ownership interest may be liable for a nuisance created or maintained by the corporation. In reaching this conclusion, the court relied upon *McSwain* v. *Redford Twp.*, 173 Mich. App. 492, 499, (1988). This Court finds that *McSwain* is distinguishable, however, both factually and legally. *McSwain* addressed township liability to landowners for failure to install a sewer system, not corporate officer liability. Further, it was decided based upon the law of nuisances, not corporate law. *Id.*, Citing 58 Am. Jur. 2d. Nuisances, § 49, p. 616.

Where the state supreme court has not spoken, the federal court must discern how that court would respond if confronted with an issue. *Bailey* v. *V & 0 Press Co.*, 770 F.2d 601, 604 (6th Cir. 1985). The Court is not free to disregard the opinion of an intermediate state court unless it is convinced the highest court would decide otherwise. *FL Aerospace* v. *Aetna Casualty & Sur. Co.*, 897 F.2d 214, 218 (6th Cir.), *cert. denied* 488 U.S. 911 (1990). The state court's reliance on *McSwain* as support for the decision in *Acme Disposal* is clearly misplaced. Accordingly, this Court is not persuaded that the Michigan Supreme Court would adopt the reasoning advocated in *Acme Disposal*. Plaintiffs' reliance upon it to hold the defendants responsible because of their positions as corporate officers, therefore, is misplaced.

C. Standards of Liability Adopted by Other Circuits

Guided by the principles discerned from the law of this circuit and state corporate law, the Court has

reviewed the alternatives adopted by other courts to determine whether corporate officers are liable as responsible persons under CERCLA. Apparently, four separate standards for liability have been employed: (1) piercing the corporate veil; (2) the capacity or authority to control corporate conduct; (3) the prevention test; and (4) direct control over or participation in wrongful conduct.

1. Piercing the Corporate Veil

The Fifth Circuit has adopted the first alternative, piercing the corporate veil, in assessing corporate successor liability. Under traditional corporate law, piercing the corporate veil requires a showing that officers or directors have violated corporate formalities or breached fiduciary duties. In *Joslyn Corp.* v. *T. L. James & Co.*, 696 F. Supp. 222, 224-45 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991), the court in dicta rejected the analyses of courts that held officers liable for clean up cost without first piercing the corporate veil because "they have chosen to ignore the corporate form without an express congressional directive" to do so. *Id.* at 83.

In the opinion of this Court, this test of derivative liability ignores other avenues of corporate law through which liability may be imposed. The Fifth Circuit addressed the issue again in *Riverside Mkt. Dev. Corp.* v. *Int'l Bldg. Products, Inc.*, 931 F.2d 327 (5th Cir. 1991), and reached a different conclusion as to operator status. Although piercing the corporate veil continued to be the standard for imposing liability on a corporate officer as an owner, direct participation in the improper disposal was the key to imposing liability on the corporate officer as an operator. *Id.* at 330.

2. Capacity or Authority to Control Corporate Conduct

Under the capacity or authority to control corporate operations test, liability attaches if the individual could have controlled the activity. Direct participation is not necessary. In *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), the president and major shareholder of Northeastern was found liable as a generator under the RCRA. *Id.* at 745. This decision also addressed the liability of a plant supervisor as an "arranger" of disposal of hazardous substances under § 107(a)(3). Because the manager actually participated in illegal conduct, liability was imposed. Accordingly, the case is of limited value in assessing liability pursuant to § 107(a)(2), and this Court declines to apply the analysis under RCRA or § 107(a)(3) to the facts presented here.

3. The Prevention Test

Under the prevention test, the court reviews evidence of an individual's authority to control waste handling practices, including distribution of power in the corporation, percentage of shares owned, responsibility for waste disposal practices and neglect in that regard. *Kelley* v. *ARCO Industries Corp.*, 723 F. Supp. 1214, 1219-1220 (W.D. Mich. 1989). This test was adopted by a district court in Illinois, *Quadion Corp.* v. *Mache*, 738 F. Supp. 270 (N.D. Ill. 1990). In the opinion of this Court, this test results in expanded liability based on a corporate officer's position, a formulation which ignores basic principals of corporate law. Power or authority is not a relevant factor in determining liability of a corporate officer for tortious conduct. For this reason the Court declines to adopt this test.

4. Direct Control or Participation

In *New York* v. *Shore Realty*, 759 F.2d 1032 (2nd Cir. 1985), the court adopted the direct control or participa-

tion test. In that case, liability was imposed on the principal officer and shareholder as an operator under CERCLA where the corporation purchased contaminated property but did not dispose of any hazardous substance. The officer knew that hazardous waste was stored on the property which was operated illegally as a waste storage facility, yet continued to allow new waste to be stored at the site. The court noted that the definition of owner or operator "excluded a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility." *Id.* at 1052. The court concluded from that definition that the exclusion implied that a stockholder who managed the corporation may be liable under CERCLA as an operator. *Id.*

After reviewing related caselaw from the Sixth Circuit, Michigan corporate law, and the various tests employed by other circuits, the Court finds that the direct control or participation test, which holds individuals accountable for their own tortious acts, is the appropriate standard to be used in assessing operator liability. This standard recognizes that the statute includes as responsible parties those that may be found liable under traditional corporate law principles.

Using this standard, the Court must decide whether, as a matter of law, the Tiscornia defendants participated actively in the waste handling practices at AUSCO, especially in the disposal of baghouse dust. Active participation is not limited to actual disposal, but extends to decisionmaking and supervision such that an officer could be considered an active individual participant in the unlawful conduct.

The plaintiffs argue that prior to 1986, there is no genuine issue of material fact that the Tiscornia defendants ran AUSCO, made final decisions regarding environ-

mental issues and are clearly liable under traditional common law corporate and tort principles.[12] The evidence upon which the plaintiffs rely in support of its motion includes: the Executive Committee meetings including the discussions of environmental matters, the use of onsite landfills from 1979 through 1981; and the exceedances on the water discharge permits.

It is clear from the documents cited to the Court that environmental issues were discussed at 111 of 435 meetings of the Executive Committee. Nevertheless, the defendants contend that Lester, James and Edward Tiscornia, as members of the Executive Committee, did not directly handle the day-to-day waste management. As members of the Executive Committee, however, they did establish policies of environmental compliance, which were then carried out by four AUSCO employees. Richard Lee acted as plant manager for the St. Joseph and Riverside facilities from 1968 through 1985. Fred Preston, a metallurgical engineer, headed materials engineering. Preston testified that he was unaware of a single instance when cost determined the corporate response to an environmental concern. Gerald Sanders worked as a maintenance electrician and handled environmental compliance of the PCB transformers. Bruce Ladewski worked as a water quality technician.

The DNR dealt with these employees, not the Tiscornia defendants. Only one DNR employee ever had direct contact with any of the Tiscornia defendants. Charles Bikfalvy met James Tiscornia at one of the plants. Bikfalvy stated in his deposition that the two

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12 **Apparently, this argument is based on the fact that the Tiscornias did not follow the suggestions of their employees and that they continued to dump in the landfills even though they had no permit. A memorandum written by Fred Preston, a metallurgical engineer, advocates compliance with permits and discusses alternative solutions to dealing with exceedances. The meaning of this memo. is open to differing interpretations.**

discussed hazardous waste and compliance, however, this contact did not leave Bikfalvy with the impression that James Tiscornia ever approved of a waste violation.

This evidence, relied upon by both parties, lends itself to inferences favoring both parties. The number of meetings in which environmental matters were discussed creates an inference that the Tiscornia defendants were not only aware of these matters, but somehow actively involved in them. The Tiscornias, however, stated that they confined their involvement to policymaking. The Tiscornias did hire specialists to manage disposal matters, an action which supports their characterization. The content of discussions of environmental issues has been summarized to the point of sanitization. No inferences flow from the notes themselves. The apparent meaning of several memos sent to the Executive Committee or its members has been put into doubt through the deposition testimony and affidavits of their authors. The credibility of each of the defendants and the employees who were intimately involved in waste disposal appear to be crucial to the resolution of this litigation. Because the evidence as now presented is subject to conflicting interpretations and credibility determinations must be made, summary judgment is improper.

In accordance with the opinion rendered above, this Court finds that defendant's motion for summary judgment is **DENIED** and plaintiffs' motion for partial summary judgment as to the liability of each of the Tiscornia defendants is also **DENIED.**

IT IS SO ORDERED.

/s/ DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

Dated: *April 23, 1993*

(Certification Omitted)

OPINION

(United States Court of Appeals — Tenth Circuit)

(Filed July 9, 1993)

(FMC CORPORATION, a Delaware corporation; Hewlett Packard Company, a California corporation; Monsanto Company, a Delaware corporation; National Semi-Conductor Corporation, a Delaware corporation, Plaintiffs-Appellees-Cross-Appellants, v. AERO INDUSTRIES, INC., a Nevada corporation; Xtron Corporation, a Nevada corporation; Perry Russell, individually and as agent for defendants Aero Industries and Xtron Corporation, Defendants-Cross-Appellees, and Robert Terry, individually and as agent for defendants Aero Industries and Xtron Corporation, Defendant-Appellant-Cross-Appellee – Nos. 92-4040, 92-4048; Appeal from the United States District Court for the District of Utah)

Before: SEYMOUR and TACHA, Circuit Judges, and ROGERS,[1] District Judge.

SEYMOUR, Circuit Judge.

*1 Defendant Robert M. Terry appeals the judgment rendered against him and in favor of FMC Corporation, Hewlett Packard Company, Monsanto Company, and National Semiconductor Corporation (plaintiffs) for response costs incurred by plaintiffs in removing hazardous waste materials from a site pursuant to the requirements of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601-9657. Plaintiffs cross appeal for attorneys fees incurred both in the waste removal process and in the

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[1] **The Honorable Richard D. Rogers, Senior United States District Judge, United States District Court for the District of Kansas, sitting by designation.**

response cost recovery litigation. We affirm in part, reverse in part, and remand for further proceedings.

I.

Defendant Aero Industries, Inc. purchased the facility at issue at a bankruptcy auction through its Chief Executive Officer Mr. Terry. The property had been used as a gallium and arsenic refining facility. Despite knowing this, Aero did not investigate the environmental condition of the property prior to the purchase. Defendants either knew or could have discovered the condition of the site because the bankruptcy file contained notices advising potential purchasers of alleged contamination on the premises and possible state and federal regulatory problems. After the purchase, the Utah Department of Health contacted Aero and indicated its concern regarding hazardous materials on the site and requested Aero's compliance with a state approved closure plan for the site. Aero repeatedly assured the State that it would comply with the closure plan. Although it had initially planned to sell the property and dispose of any hazardous substances, Aero later decided to reopen the facility.

Defendants Robert Terry and Perry Russell[2] formed defendant Xtron Corp. as a manufacturing firm for gallium arsenide. Aero had a fifty percent interest in Xtron, and Mr. Terry served as chairman of the board for both corporations. Aero and Mr. Terry were the sole source of capital for Xtron and controlled Xtron's finances.

In order to operate the facility, defendants remodeled and made improvements to the site, purchased equipment leased by the previous owner, purchased other equipment, recontainerized and relocated hazardous materials, solicited customers to purchase planned

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2 **Russell was later dismissed as a defendant.**

products and hazardous material, conducted a test burn of the gallium crystal furnace, shipped some hazardous material for offsite disposal, and solicited suppliers of gallium arsenide scrap for recycling. Defendants did not, however, comply with the state-approved closure plan or transport hazardous materials offsite for recycling or otherwise properly dispose of them. Mr. Terry had authority over Aero's and Xtron's activities concerning the site.

In May 1988, the EPA notified Aero, Xtron, plaintiffs and others that they were potentially responsible parties liable for removal of hazardous materials at the site. On July 12, 1988, EPA issued a unilateral administrative order under CERCLA directing Aero, Xtron, plaintiffs and others to take action to remove hazardous substances and contaminated soil from the site and to reduce threats of exposure to such materials. Plaintiffs and defendants entered into an agreement to clean up the site. Plaintiffs and Texas Instruments agreed to do various things including removal of contaminated soil related to treater dust piles. Defendants agreed, among other things, to remove contaminated soil related to storage ponds. Plaintiffs and Aero sent the EPA a joint letter specifying the tasks which the parties had agreed to complete.

*2 Fearing penalties under the EPA order, plaintiffs alone commenced cleanup work in September 1988. Due to a lack of funds, defendants did not perform any of the cleanup they had agreed to perform. In August 1989, the EPA accepted plaintiffs' cleanup and certified that their response costs for the removal were necessary and not inconsistent with the National Contingency Plan.

Plaintiffs incurred $970,605.20 in response costs in conducting the removal action. They also incurred $244,287.89 for nonlitigation removal-related attorney's

fees and costs, and a substantial amount of litigation fees and costs.

Plaintiffs filed suit for cost recovery against defendants. Defendants filed a motion to dismiss and a demand for a jury trial. The district court granted plaintiffs' motion for partial summary judgment on the issue of liability, holding defendants jointly and severally liable as owners and operators for response costs. The remaining issues concerning allocation of the response costs were to be tried. The parties' pretrial order and two modified pretrial orders specified that the trial would be to the court without a jury. After the bench trial, the district court entered findings of fact and conclusions of law allocating to defendants jointly and severally twenty-five percent of plaintiffs' total response costs. The district court denied plaintiffs' request for litigation and nonlitigation attorneys fees and costs as part of the response costs. The court concluded as a matter of law that attorneys fees do not constitute response costs under CERCLA. The court entered judgment in favor of plaintiffs for $311,368.03. Only Mr. Terry appealed. Plaintiffs cross-appealed, objecting to the portion of the judgment denying attorneys fees and costs as not constituting recoverable response costs.

II.

On appeal, Mr. Terry first argues that the CERCLA cost recovery action should have been tried to a jury. He and the other defendants did request trial by jury. However, the pretrial order, which was signed by Mr. Terry, and modified pretrial orders stated there would be a bench trial. Moreover, Mr. Terry did not object to the bench trial. We hold that Mr. Terry waived any right he may have had to a jury trial by signing the pretrial order and participating in the

bench trial.[3] See *White* v. *McGinnis*, 903 F.2d 699, 703 (9th Cir.) (*en banc*), *cert. denied*, 498 U.S. 903 (1990); *Royal Am. Managers, Inc.* v. *IRC Holding Corp.*, 885 F.2d 1011, 1018 (2d Cir. 1989); *Lovelace* v. *Dall*, 820 F.2d 223, 227 (7th Cir. 1987) (*pro se*); *United States* v. *1966 Beechcraft Aircraft Model King Air A90 Cream with Burg & Gold Stripes SN:LJ-129, FAA Reg: 333GG, Equipt*, 777 F.2d 947, 950-51 (4th Cir. 1985); *Southland Reship, Inc.* v. *Flegel*, 534 F.2d 639, 644 (5th Cir. 1976). See generally 9 Charles A. Wright & Arthur P. Miller, *Federal Practice & Procedure* 2321 (1971) ("right to jury trial may . . . be waived by conduct or agreement of the parties.").

III.

*3 Mr. Terry's second argument on appeal is that he is not liable because he did not contribute to the dumping of hazardous waste on the site and he is not an operator and not in control of Aero or Xtron. He maintains that various nonparties should instead be held liable for their portion of any cleanup costs.

The district court entered partial summary judgment for plaintiffs determining that all defendants were jointly and severally liable for response costs. The court specifically held Mr. Terry liable as an operator. This court reviews the grant of summary judgment de novo, applying the same legal standards used by the district court under Fed. R. Civ. P. 56(c). *Applied Genetics Int'l, Inc.* v. *First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). "Summary judgment is appropriate when there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law." *Russillo* v. *Scarborough*, 935 F.2d 1167, 1170 (10th Cir.

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[3] **In addition to arguing waiver, plaintiffs contend that Mr. Terry did not have a right to a jury trial. Given our disposition, we need not address this contention.**

1991). This court must view the record in the light most favorable to the nonmoving party. *Deepwater Invs., Ltd.* v. *Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991).

To establish a prima facie case of liability in a CERCLA cost recovery action, a plaintiff must prove (1) the site is a facility as defined in 42 U.S.C. 9601(9), (2) defendant is a responsible person as defined in 42 U.S.C. 9607(a), (3) the release or threatened release of a hazardous substance has occurred, and (4) the release or threatened release has caused the plaintiff to incur response costs. *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989). Only the second element is at issue in this case.

Section 9607(a)(1) defines a responsible party as any owner or operator of a facility. An owner or operator is defined as a person who participates in the management of a facility and who is not merely a stockholder. 42 U.S.C. 9601(20)(A). In determining whether a person is an operator, some courts do not require the defendant to have exercised actual control in order to qualify as operators under section 9607(a) as long as the authority to control was present. See *United States* v. *Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992); *Nurad, Inc.* v. *William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir.), *cert. denied*, 113 S.Ct. 377 (1992). In *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 957 (1991), however, the court said: To be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary. See also *Redland Soccer Club, Inc.* v. *Dep't of the Army of the United States*, 801 F. Supp. 1432, 1437 (M.D. Pa. 1992); *Bowen Eng'g* v. *Estate of*

Reeve, 799 F. Supp. 467, 474 (D. NJ. 1992). On the other hand, actual control and personal participation in the wrongful conduct clearly makes one an operator under CERCLA. See *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *Riverside Mkt. Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.), *cert. denied*, 112 S.Ct. 636 (1991).

*4 We need not decide which approach is best because it is undisputed on the record that Mr. Terry exercised actual control and personally participated in any conduct that violated CERCLA. He made the decision for Aero to purchase the property. He searched for potential purchasers of the hazardous material. He authorized the cleanup and closure agreements made to state and federal officials. On behalf of Aero, he signed the agreements with plaintiffs that they would jointly comply with the EPA's unilateral administrative order and conduct removal activities on the site. He made the decision to reopen operations at the site after deciding to set up Xtron. He was chairman of the board of Xtron, and he controlled its finances. The president of Xtron sent Mr. Terry regular reports concerning the operation and handling of hazardous wastes. When it proved too difficult to put the site back into full operation, Mr. Terry attempted to merge Xtron with another company. When the merger failed, he decided to stop Xtron's business operations and abandoned the site. He negotiated the sale of the equipment on the site and arranged for its shipping. The evidence thus fully supports the district court's conclusion that Mr. Terry was an operator.[4]

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[4] **Mr. Terry also contends that he was an innocent purchaser who did not contribute to the dumping of hazardous materials on the site and therefore cannot be held responsible as an owner. Because he was found liable as an operator and not as an owner of the site, we need not address this argument.**

Accordingly, the district court did not err in granting partial summary judgment in favor of plaintiffs on this issue.[5]

IV.

Mr. Terry argues that the district court erred in allocating twenty-five percent of the response costs to defendants. He maintains that such costs should have been allocated to nonparties. A district court has considerable discretion in apportioning equitable shares of response costs. *United States* v. *R.W. Meyer, Inc.*, 932 F.2d 568, 571 (6th Cir. 1991); *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d at 672. It can allocate the response costs among the liable parties using any equitable factors it deems appropriate. 42 U.S.C. 9613(f)(1). The court must balance the equities in light of the totality of the circumstances. *R.W. Meyer, Inc.*, 932 F.2d at 572; see *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993) (apportionment is intensely factual determination).

After reviewing the record and the district court's findings, we cannot say that the court abused its discretion in making the twenty-five percent apportionment. It considered the evidence and rejected plaintiffs' request for fifty percent contribution. It considered the liability of nonparties in apportioning the costs, as well as other relevant factors. Mr. Terry did not establish that his costs should have been less due to liability of nonparties.

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[5] In his opening brief at pages 29-34 and 36-39, Mr. Terry lists several findings of fact which he disputes. His disputes are not as to material facts and therefore do not affect the district court's determination that he was an operator. He also contends that Gordon Bird, the on-site manager of Xtron, had authority and control rather than Mr. Terry. Although Mr. Bird may have been an operator, that does not preclude Mr. Terry from also being an operator.

V.

In their cross-appeal, plaintiffs argue that the district court erred in disallowing their litigation and nonlitigation removal-related attorneys fees and costs as a matter of law. The district court held that CERCLA contains no explicit authorization for permitting the recovery of attorneys fees and costs as response costs. This legal conclusion is reviewable de novo. *United States* v. *Hardage*, 982 F.2d 1436, 1446 (10th Cir. 1992).

***5** Under section 9607(a)(4)(B), a private party may recover the "necessary costs of response." CERCLA defines "response" to include "enforcement activities related thereto." 42 U.S.C. 9601(25). Plaintiffs contend that this language authorizes an award of fees incurred both in litigating the recovery action and in removal-related nonlitigation activities. We agree with plaintiffs in part.

We turn first to the availability of litigation fees for the recovery suit. "[T]he law of the United States . . . has always been that absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation." *Runyon* v. *McCrary*, 427 U.S. 160, 185 (1976). The circuits have split on whether the statutory language quoted above contains the requisite explicit authority to award litigation fees. Compare *Donahey* v. *Bogle*, 987 F.2d 1250, 1256 (6th Cir. 1993) (litigation fees may be awarded); *General Elec. Co.* v. *Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990) (same), *cert. denied*, 111 S.Ct. 1390 (1991), with *Juniper Dev. Group* v. *Kahn (In re Hemingway Transp., Inc.)*, Nos. 92-1040, 92-1095, 92-1289, 92-1290, 1993 WL 137423, at *13 (1st Cir. May 4, 1993) (litigation fees not recoverable); *Stanton Rd. Assocs.* v. *Lohrey Enters.*, 984 F.2d 1015, 1018-19 (9th Cir. 1993) (same).

We simply cannot agree with those courts that find an explicit authorization for the award of litigation fees

from the fact that response costs include related enforcement activities. We recognize that CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others. It may be true that awarding the litigation fees incurred in that recovery would further this goal. Nonetheless, the efficacy of an exception to the American rule is a policy decision that must be made by Congress, not the courts. The desirability of a fee-shifting provision cannot substitute for the express authorization mandated by the Supreme Court. See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 263-64 (1975). Accordingly, we conclude that a private party may not recover attorneys fees arising from the litigation of a private recovery action.

We reach a different legal conclusion, however, with respect to nonlitigation attorneys fees. Such fees do not fall under the American rule set out in *Alyeska* and *Runyon* because they are not incurred in pursuing litigation. Accordingly, recovery of these fees is not barred as a matter of law. Rather, the issue is whether nonlitigation attorneys fees are necessary response costs within the meaning of section 9607(a)(4)(B).

We considered a related question in *Hardage*, 982 F.2d 1436. Although that case is distinguishable on its facts, our discussion there of necessary costs is instructive. In *Hardage*, the government sought injunctive relief against HSC to require it to clean up a Superfund site. HSC counterclaimed against the government as a responsible party for response costs HSC incurred, *inter alia*, in developing its trial remedy. The district court found, as a matter of fact, that these litigation-related response costs were not necessary costs under section 9607(a)(4)(B). In affirming, we stated that "'necessary costs of response' must be necessary to the contain-

ment and cleanup of hazardous releases." *Id.* at 1448 (citing *Daigle* v. *Shell Oil Co.*, 972 F.2d 1527, 1535-37 (10th Cir. 1992)). Applying this definition to the particular facts of that case, we held that "when a private party incurs response costs in developing its own remedy, solely to defend against the government's 106(a) injunction action, the private party's response costs are not 'necessary' within the meaning of [section 9607(a)(4)(B)]." *Id.* (emphasis added).

***6** In the instant case, as distinguished from *Hardage*, plaintiffs incurred response costs complying with a unilateral EPA order and performing the cleanup work under EPA direction. Plaintiffs seek recovery of the nonlitigation attorneys fees generated in designing and negotiating the removal action and in preparing and carrying out the work plan approved by the EPA. For example, plaintiffs submitted affidavits to the district court evidencing fees paid for the negotiating and drafting contracts with environmental professionals who performed the removal work, negotiating changes to the work plan, and monitoring work progress. We cannot say as a matter of law that, under the circumstances here, none of these nonlitigation attorneys fees were necessary response costs. Accordingly, we must remand to the district court for further proceedings to ascertain whether any of the nonlitigation attorneys fees sought by plaintiffs were necessary to the containment and cleanup of hazardous releases and therefore recoverable as necessary costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.